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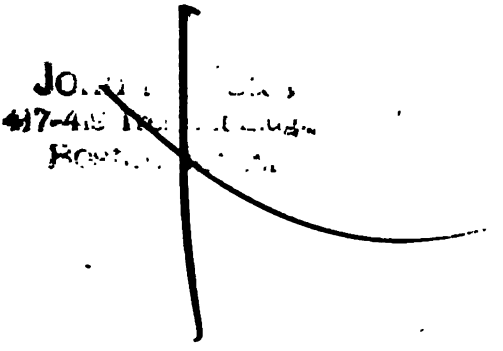

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MASSACHUSETTS REPORTS

230

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS

MARCH 1918 — JUNE 1918

HENRY WALTON SWIFT

REPORTER

BOSTON

LITTLE, BROWN, AND COMPANY

1919

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JUSTICES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

HON. ARTHUR PRENTICE RUGG, CHIEF JUSTICE.
HON. WILLIAM CALEB LORING.
HON. HENRY KING BRALEY.
HON. CHARLES AMBROSE DE COURCY.
HON. JOHN CRAWFORD CROSBY.
HON. EDWARD PETER PIERCE.
HON. JAMES BERNARD CARROLL.

ATTORNEY GENERAL

HON. HENRY CONVERSE ATTWILL.

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In pursuance of the system adopted in 1874, beginning with 115 Mass., the cases are reported in the order of decision, and those decided on the same day are arranged according to the dates of argument or submission on briefs. The only exception to this rule is that, where an opinion is withdrawn temporarily by order of the court and is returned to the reporter too late to be printed in its regular place, it is inserted at the time of its return.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS.

ASA A. MILLS *vs.* HENRY C. SAMUELS.

Bristol. February 6, 1918. — March 6, 1918.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Damages, For property taken or impaired by statutory authority. *Way*, Public. *Landlord and Tenant*, Apportionment of damages for taking of respective interests. *Eminent Domain*. *Trust*, Trustee under R. L. c. 48, § 17.

The provision contained in R. L. c. 48, § 17, for the appointment of a trustee to receive damages awarded for the taking of interests in real estate for the laying out or alteration of a highway is intended to apply merely to cases where the only parties in interest are the tenant for life or for years of the whole estate on the one hand and the remainderman or reversioner on the other.

Where real estate taken for the widening of a highway has been leased under a lease in writing to a general lessee, who has made subleases in writing of different parts of the property to various sublessees, the owner of the reversion, who holds the rights of the lessor of the whole property under the general lease, cannot maintain a petition for the appointment of a trustee to receive the damages for the benefit of the persons entitled to them according to their respective interests under the provisions of R. L. c. 48, § 17, and the damages awarded must be apportioned under the provisions of §§ 20–24 of the same chapter.

PETITION, filed in the Probate Court for the county of Bristol on March 29, 1917, by the owner of the reversion of a certain tract of land with the buildings thereon on South Main Street in Fall River, subject to a lease to Henry C. Saunders of Cranston in the

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State of Rhode Island dated November 19, 1906, for the term of fifteen years from November 20, 1906, praying for the appointment of a trustee under the provisions of R. L. c. 48, § 17, to hold for the benefit of the petitioner and the lessee according to their respective interests the damages awarded for the taking of a portion of such tract of land for the widening of South Main Street.

The Probate Court appointed a trustee as prayed for, and the respondent appealed, contending that the case was governed by R. L. c. 48, §§ 20–25, and not by § 17 of that chapter. The appeal was heard by *Braley*, J., who was of opinion that the decree of the Probate Court should be affirmed, but at the request of the respondent reported the case for determination by the full court. The material facts in regard to the subleases are stated in the opinion.

A. S. Phillips, for the respondent.

C. R. Cummings, for the petitioner.

RUGG, C. J. This petition was brought in the Probate Court for the appointment of a trustee to recover the damages caused by the taking of a portion of a parcel of real estate by the widening of South Main Street in the city of Fall River. The petitioner is the owner of the reversion subject to a lease of the entire estate to the respondent as lessee for a term of years. Agreeably to the terms of his lease, the respondent had, before the widening of the street, sublet by indentures for terms of years parts of the demised premises in severalty to divers persons, who then were in occupation. The petitioner and the respondent each have filed petitions in the Superior Court for the assessment of their damages caused by the taking. The sublessees have become parties to the petition of the respondent. The petitions have been consolidated for trial.

The question is whether on these facts a trustee should be appointed under R. L. c. 48, § 17, or whether the petitions should be tried without the appointment of any trustee and the damages, after having been assessed as an entirety, be apportioned by the jury among the several parties found entitled thereto in proportion to their interests and the loss sustained by each, in accordance with §§ 20 and 22 of the same chapter. The history of these sections of the statute is set forth in *Boston* v. *Robbins*, 121 Mass.

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453, and in *Cornell-Andrews Smelting Co.* v. *Boston & Providence Railroad*, 209 Mass. 298, and need not be reviewed again.

Subtenants under written leases from tenants for years own interests in the estates. If such estates are seized in whole or in part by exercise of eminent domain, the owner is entitled to damages. His interest is protected by the same constitutional guaranties as are other kinds of property. It cannot be appropriated to a public use without the payment of reasonable compensation to the owner. Declaration of Rights, art. 10. The holder of such an interest was early held to be an "owner" within the meaning of that word in statutes conferring a right to petition for damages caused by the laying out of highways. *Ellis* v. *Welch*, 6 Mass. 246.

There is no reference in § 17 (so far as concerns facts like those here presented and leaving out of consideration contingent remainders, executory devises and powers of appointment) to any parties except the tenant for life or for years on the one side, and the remainderman or reversioner on the other. No provision is made for subtenants of parts of the estate, or for the ascertainment of their damages. It is plain the § 17 applies only to cases where the tenant for years or life has an interest in the estate commensurate in territorial extent with that of the remainderman or reversioner. The section plainly is not adapted to the case where the tenant has an estate smaller than is co-extensive in area with the estate in remainder or reversion. *Galeano* v. *Boston*, 195 Mass. 64, 66. The trustee is to hold the damages for the benefit of the "parties." That word can refer only to the "tenant for life or for years," and to "the remainderman or reversioner." They are the only "parties" mentioned in the statute. The terms of the trust are to pay from the income "to the reversioner or remainderman the value of any annual rent or other payment" which but for the taking by eminent domain would "have been payable by the tenant," and the balance of the income is to be paid "to such tenant," that is, the tenant for life or for years of the whole estate, because no other kind of tenant has before been mentioned. At the expiration of that tenancy, the principal is to be paid to the remainderman or reversioner. These are all the terms of the trust. They provide for the complete disposition of the whole of the trust fund, both

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principal and income. There is nothing left for the holder of any leasehold estate less than the entire estate. On reason, therefore, § 17 cannot apply to a case like the present, where the owner of the leasehold of the entire estate has carved out of his estate several smaller interests in the estate which still are outstanding. If the landowner had desired to prevent that, a clause prohibiting subletting might have been inserted in the lease.

This conclusion is in accord with a statement by Wells, J., in *Edmands* v. *Boston*, 108 Mass. 535, where, referring to Gen. Sts. c. 43, § 17, which is the same in substance as the present § 17, he said "That statute is adapted to cases only in which the relation of tenant for life or years and remainderman exists without modification by contract between the parties or otherwise."

There is nothing contrary to this result in *Boston* v. *Robbins*, 126 Mass. 384. In that case, the subtenants were tenants at will and not holders of leases of interests in the estate. It does not appear that they attempted to recover damages. *Benedict* v. *Morse*, 10 Met. 223, 229. *Swift* v. *Boyd*, 202 Mass. 26, 28. The reference in *Stark* v. *Mansfield*, 178 Mass. 76, 82, is to a "sublease of a part of the term" and not of a part of the demised premises. The interests of the tenants for years in that case were successive in point of time and of the whole estate. There was no occasion for apportionment. That decision establishes or recognizes the principle that where the sublessee holds the entire use of the premises covered by his lessor's term § 17 governs; but it has nothing to do with a case where different tenants have several and divided interests in that term, which is governed by § 20. See *Wheeler* v. *Earle*, 5 Cush. 31, 35, and *Miller* v. *Prescott*, 163 Mass. 12. In the case of *Turner* v. *Robbins*, 133 Mass. 207, the lessees for years of the entire estate sought a different distribution of the trust fund from that provided by the statute. It has no pertinency to a case like the present.

It follows that the rights of the parties as to assessment of damages are governed by §§ 20 to 24, and not by § 17. Hence there is no occasion for the appointment of a trustee.

Decree reversed; decree to be entered dismissing petition.

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RICHARD MORAN *vs.* E. FREDERICK MURPHY.

Suffolk. March 5, 1918. — March 6, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Practice, Civil, Appeal.

An appeal in an action at law under R. L. c. 173, § 96, as amended, brings before this court only errors "founded upon matter of law apparent on the record."

Where on an appeal to this court in an action of law there was appended to the record and printed as a part of the appeal what purported to be a copy of all the evidence in the case, it was *held* that this constituted no part of the record and could not be considered by the court.

TORT against a physician for negligently giving a false opinion in writing that a certain Delia Harkins, to whom the plaintiff had been engaged to be married, was pregnant, by reason of which the plaintiff was arrested on a complaint of Delia Harkins charging him with getting her with child, whereas Delia Harkins was not pregnant at the time that the defendant made his examination of her. Writ dated May 8, 1916.

In the Superior Court the case was heard by *Hardy,* J., without a jury. He found for the defendant. The plaintiff appealed from the decision. The defendant moved that the plaintiff's appeal be dismissed and that judgment be entered on the finding. The motion was granted and it was ordered by the judge that judgment be entered for the defendant. The plaintiff appealed "from the decision of the court in ordering that judgment be entered for the defendant."

The case was submitted on a brief by the plaintiff.

J. J. Kelly, for the plaintiff.

W. Flaherty, for the defendant, submitted the case without brief or argument.

BY THE COURT. This case comes before us on appeal from a judgment in favor of the defendant. It is an action at law. An appeal in an action at law under R. L. c. 173, § 96, as amended, brings before the full court for examination errors "founded upon matter of law apparent on the record." The writ, declaration, answer, finding in favor of defendant, motion for judgment and

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allowance thereof, and the appeal of plaintiff, in the case at bar constitute the record. Manifestly they disclose no error of law.

There is printed as a part of this appeal what purports to be a copy of all the evidence. That is no part of the record. The only way to bring the material evidence before this court in an action at law is by exceptions or by report. No exceptions appear to have been taken. There is no report by the judge who tried the case. *Given* v. *Johnson*, 213 Mass. 251. *Regal* v. *Lyon*, 212 Mass. 230. *Cressey* v. *Cressey*, 213 Mass. 191.

Judgment affirmed.

COMMONWEALTH *vs.* FRED H. HYDE.

Essex. February 6, 1918. — February * 7, 1918.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

State Board of Health. Water Supply, Protection of. *Haverhill. Crystal Lake.*

Under R. L. c. 75, § 113, as amended by St. 1907, c. 467, § 1, which empowers the State board of health to "make rules and regulations to prevent the pollution and to secure the sanitary protection, of all such waters as are used as sources of water supply" and to "delegate the granting and withholding of any permit required by such rules or regulations to . . . water boards and water commissioners in cities and towns," a rule of the State board of health, that "No person shall . . . , unless permitted by a written permit of the board of water commissioners of the city of Haverhill, fish in . . . Crystal Lake . . . , so called, in the city of Haverhill . . . , said lakes . . . being used by said city as sources of water supply," is valid and enforceable.

COMPLAINT, received and sworn to in the Central District Court of Northern Essex on January 3, 1917, charging that the defendant on January 2, 1917, "did then and there go upon the ice of Crystal Lake, so called, in Haverhill, and did fish in said lake, without a permit to do so of the board of water commissioners of the said city of Haverhill, in violation of the rules and regulations of the State board of health of the said Commonwealth."

In the Superior Court the case was tried before *Dubuque*, J.,

* This case was printed out of order by mistake as if the rescript had been dated March 7, 1918, instead of February 7, 1918.

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on an agreed statement of facts. Upon the agreed statement of facts the judge instructed the jury, subject to the defendant's exception, that they would be warranted in returning a verdict of guilty. Thereupon the jury returned such a verdict, and the judge, being of opinion the question raised by the defendant's exception ought to be determined by this court, reported the case for such determination.

R. L. c. 75, § 113, as amended by St. 1907, c. 467, § 1, is as follows: "Said board may cause examinations of such waters to be made to ascertain their purity and fitness for domestic use or their liability to impair the interests of the public or of persons lawfully using them or to imperil the public health. It may make rules and regulations to prevent the pollution and to secure the sanitary protection, of all such waters as are used as sources of water supply. Said board may delegate the granting and withholding of any permit required by such rules or regulations to State boards and commissions and to selectmen in towns and to boards of health, water boards and water commissioners in cities and towns, to be exercised by such selectmen, boards and commissions, subject to such recommendation and direction as shall be given from time to time by the State board of health; and upon complaint of any person interested said board shall investigate the granting or withholding of any such permit and make such orders relative thereto as it may deem necessary for the protection of the public health."

The case was submitted on briefs.

H. C. Thompson, for the defendant.

L. S. Cox, District Attorney, for the Commonwealth.

RUGG, C. J. This is a complaint charging the defendant with going upon the ice of Crystal Lake and fishing therein without a written permit of the water commissioners of the city of Haverhill, in violation of rules and regulations of the State board of health. The pertinent part of the regulation of the State board of health is as follows: "No person shall . . . , unless permitted by a written permit of the board of water commissioners of the city of Haverhill, fish in . . . Crystal Lake . . . , so called, in the city of Haverhill . . . , said lakes . . . being used by said city as sources of water supply."

The regulation was passed pursuant to R. L. c. 75, § 113, as

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amended by St. 1907, c. 467, § 1, which empowers the State board of health to "make rules and regulations to prevent the pollution and to secure the sanitary protection, of all such waters as are used as sources of water supply," with power to delegate the granting or withholding of permits to water commissioners, subject to investigation and revision by way of appeal to the board itself.

The delegation by the Legislature of the right to make rules and regulations is within its power. *Commonwealth* v. *Sisson*, 189 Mass. 247. *Commonwealth* v. *Kingsbury*, 199 Mass. 542. The case at bar thus is distinguished from *Commonwealth* v. *Staples*, 191 Mass. 384, where no power of delegation was conferred by the statute there under consideration. The power of revising the conduct of the water commissioners reserved to the State board of health by the statute avoids the difficulty of vesting an untrammelled discretion in a subordinate board or officer, which was held fatal to the ordinance before the court in *Commonwealth* v. *Maletsky*, 203 Mass. 241. *Goldstein* v. *Conner*, 212 Mass. 57. *Stevens, landowner*, 228 Mass. 368.

The regulation passed by the State board of health, in pursuance of the statutory authority, prohibiting fishing upon a body of water used as source of water supply for a municipality, cannot be pronounced unreasonable. It requires no discussion to demonstrate that the preservation of the purity of the water supply for the domestic uses of the people is within the police power. The absolute prohibition of fishing upon such a source of supply could not be said to be unreasonable under the circumstances here disclosed. It is not irrational for a public board to deem it likely or possible that sources of contamination and germs of disease might have a causal connection with the presence of fishermen upon the ice or waters of a supply of drinking water. *Nelson* v. *State Board of Health*, 186 Mass. 330. *Sprague* v. *Minor*, 195 Mass. 581. The case of *Austin* v. *Murray*, 16 Pick. 121, upon which the defendant relies, is quite distinguishable.

Exceptions overruled.

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VINCENZO PAGNONI'S (dependents') CASE.

Suffolk. February 4, 1918. — March 8, 1918.

Present: BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

Workmen's Compensation Act, Dependency.

In a claim under the workmen's compensation act by the alleged dependents of a deceased employee, where there is no one wholly dependent and the next of kin partly dependent are the father and mother of the employee living in a foreign country, to whom he may have made contributions from his wages for their joint benefit, in the absence of any finding as to the relative extent of the dependency of the two parents it is wrong for the Industrial Accident Board to make an award of compensation to the father and mother jointly, and, where the board made such a joint award, it was *ordered* that the claim should be remanded to the board for determination of the relative extent of the dependency of the two parents under St. 1911, c. 751, Part II, § 7.

APPEAL under St. 1911, c. 751, Part III, § 11, as amended by St. 1912, c. 571, § 14, from a decision of the Industrial Accident Board making an award to Santa Pagnoni and Guiseppe Pagnoni jointly, the mother and father of Vincenzo Pagnoni, a deceased employee, as his next of kin partly dependent upon his earnings for support at the time of his injury and death.

The case first was heard by *Hardy*, J. The judge made a decree in accordance with the decision of the Industrial Accident Board; and the insurer appealed. Later, on motion of the insurer the case was remanded to the Industrial Accident Board for correction and amplification of the record. The essential facts are stated in the opinion. The board again made the same decision, and on appeal this decision was affirmed by a decree made by *J. F. Brown*, J.; and the insurer again appealed.

N. F. Hesseltine & J. F. Scannell, for the insurer, submitted a brief.

G. Gleason, for the dependents.

DE COURCY, J. It is agreed that the employee died from an injury arising out of and in the course of his employment. The committee of arbitration found that the claimants Santa Pagnoni and Giuseppe Pagnoni, the mother and father of the deceased, were partly dependent upon his earnings for support at the

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date of his injury and death and awarded compensation at the rate of $2.56 per week for five hundred weeks. The Industrial Accident Board on review affirmed the findings and decision of the committee.

The only issue tried was that of the dependency of the claimants. Although the insurer filed more than fifty requests for rulings, we deem it necessary to consider only the three questions argued on its brief.

1. The claim for compensation filed by the attorney for the dependents on July 21, 1915, is the one relied on; and it complies with all the requirements of the statute. It states the time, place, cause and nature of the injury; it is signed on behalf of the dependents by the attorney who represented them at the hearing; and it was filed within six months after the death of the employee. St. 1911, c. 751, Part II, (as amended by St. 1912, c. 571, § 5,) §§ 23, 15.

2. The contention, that alien non-resident dependents are not entitled to compensation under our workmen's compensation act, is disposed of by *Derinza's Case*, 229 Mass. 435.

3. The award was made to the mother and father jointly. The statute (Part II, § 7) provides that: ". . . if there is no one wholly dependent and more than one person partly dependent, the death benefit shall be divided among them according to the relative extent of their dependency." In this case the board made no finding as to the relative extent of the dependency; and the difficulty of doing so is apparent where the contributions may have been made for the joint benefit of both parents. The claimants, however, are willing to have the entire amount awarded to the father, who was the head of the family; and to rely upon having the case reopened for further hearing if the father should die during the period of compensation, leaving the mother surviving. *Bartoni's Case*, 225 Mass. 349. In our opinion the present award is not in compliance with the statute. If it is to be made to both parents, the relative extent of their dependency individually must be found. See *Osterbrink's Case*, 229 Mass. 407.

The decree must be reversed, and the case remanded to the board to make an award in accordance with the terms of this opinion.

Ordered accordingly.

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SARAH E. HAWKES, executrix, *vs.* GEORGE A. HAWKES & others.

Essex. February 6, 1918. — March 19, 1918.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Will, Attestation.

It does not make valid the attestation of a will, that all three witnesses subscribed their names in the presence, of the testator, if when two of the witnesses signed their names the instrument was folded so as to conceal the signature of the testator and neither of them saw him sign or could have seen his signature in his presence.

APPEAL from a decree of the Probate Court of the county of Essex allowing the alleged will of Mary Jane Hawkes, late of Marblehead. The following issues, which were framed in the Supreme Judicial Court, were sent to the Superior Court for trial:

"1. Was the instrument propounded for probate as the last will and testament of Mary J. Hawkes executed according to law?

"2. Was the instrument propounded for probate as the last will and testament of Mary J. Hawkes procured through fraud and undue influence of Sarah E. Hawkes?"

The issues were tried before *Callahan*, J. The evidence upon the question of attestation is described in the opinion. At the close of the evidence the proponent of the will asked the judge to make the following rulings:

"3. If the attesting witnesses subscribed the attestation clause in the presence of the testatrix and understood the instrument was her will, the execution of the will is sufficiently proved, if in fact the testatrix has signed the paper, although the attesting witnesses have not seen her sign or seen the signature itself.

"4. If the jury find that the three attesting witnesses subscribed the attestation clause in the presence of the testatrix, knowing or understanding they were witnessing her will, and the instrument had been signed by the testatrix before such attestation, then they will find the will was properly executed."

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The judge refused to make either of these rulings. Among other instructions he instructed the jury as follows: "a will, in order to be valid, must be signed in the presence of the three witnesses mentioned by the statute, or, if it has been previously signed, the testator or person making the will must then acknowledge that the signature which he exhibits to the witnesses is his. Unless one of these things is shown, the attestation is insufficient and the will does not stand." He also instructed the jury as follows: "If the jury should find that the signature of the testatrix was concealed from the witnesses, or either of them, and that they, or either of them, were not aware of its being on said alleged will and did not see it or know of such signature being there, then your answer to the first issue should be 'No'; and again I modify that by saying: provided she had not already in fact signed the will in their presence."

The jury answered both issues in the negative; and the proponent of the will alleged exceptions.

W. B. Farr, (*D. T. Cope* with him,) for the proponent.

R. L. Sisk, for the contestants.

CROSBY, J. This is an appeal from a decree of the Probate Court allowing a certain instrument as the last will of Mary Jane Hawkes. Two issues were framed by a single justice of this court and tried by a jury in the Superior Court, one of which related to the execution of the will; the other has become immaterial. The jury having found that the will was not executed according to law, the case is before us upon the exceptions of the proponent to the refusal of the presiding judge to give certain rulings, to the charge to the jury so far as inconsistent therewith, and to the giving in a modified form of certain rulings requested by the contestants.

The will was written on one sheet of legal cap paper and was all in typewriting except the date in the testimonium clause, the date in the attestation clause, the signature of the alleged testatrix and the signatures of the subscribing witnesses. The date in the testimonium clause and the signature of the deceased were in her handwriting.

Joseph W. Coates, one of the subscribing witnesses, testified that on the eleventh day of March, 1910, the testatrix, by telephone, requested him to come to her house to witness her will;

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that he went there in the evening of that day; that he did not know whether the other witnesses were there when he arrived, but they were there when the will was executed; that the testatrix produced the instrument and asked the persons present to witness her will; that he (Coates) said, "You have not inserted the date here," or something to that effect, and the testatrix replied, "Well, . . . I will sign it" — and she signed it; that he inserted the date in the attestation clause at her request, wrote his name after she had signed her name and then "folded it for the signature of the rest;" that the two other witnesses signed the will in the presence of Miss Hawkes and that all three witnesses were present when she signed the will. This witness further testified on cross-examination that when he signed his name to the will the signature of the testatrix was not exposed and could not be seen because the will was folded over, that he folded the will to conceal its contents as he supposed she wanted the contents of the will private, and that the folding concealed her signature; "that the will was so folded that the contents of the will and the signature of the testatrix were concealed; the way the will was folded the signature of the testatrix was not apparent to the witnesses."

The witness Everett Chapman testified that when he signed his name the testatrix and the other witnesses were present; that he did not remember seeing the testatrix sign the paper; and that it was folded when he signed it and he could not see the signature of the testatrix.

The third subscribing witness, Carrie Chapman, was ill and did not attend the trial; her testimony in the Probate Court was read to the jury. She testified in direct examination that she remembered signing, — and identified her signature; also, "that she saw Mr. Coates sign, but Miss Hawkes had signed." On cross-examination she testified that she did not see the signature of the testatrix on the paper because the paper was folded at the time she signed; that she never saw the signature of the testatrix on the paper until the morning she testified in the Probate Court; "that she did not know whether the testatrix had signed it when she put on her name as a witness." She further testified that she did not see the testatrix sign the instrument.

If the testatrix signed the paper in the presence of the wit-

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nesses and before it was subscribed by them, as the witness Coates testified, the jury would have been warranted in finding that the will was executed according to law, and the judge so instructed them. If the will was not so signed, the question remains whether it was duly attested and subscribed in accordance with the statute of wills. R. L. c. 135, § 1.

There was evidence from which the jury could have found that when two of the witnesses wrote their names upon the paper the signature of the deceased (if she had previously signed) was concealed from them. If the jury so found, there was not an acknowledgment by her of her signature. The case is governed by *Nunn* v. *Ehlert*, 218 Mass. 471. That decision is founded upon correct principles and as therein shown is in accord with previous decisions of this court. It is not contrary to *Tilden* v. *Tilden*, 13 Gray, 110.

The third and fourth requests of the proponent were contrary to the law as stated in *Nunn* v. *Ehlert*, *supra*, and could not properly have been given. The instructions of the presiding judge were full and accurate.

Exceptions overruled.

WILLIAM J. PHILLIPS *v.* EBEN B. PHILLIPS.

Essex. November 7, 1917. — April 8, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, & CARROLL, JJ.

Probate Court, Appeal, Master's report. *Equity Pleading and Practice*, Master's report.

On a petition under R. L. c. 162, § 13, to enter late an appeal from a decree of the Probate Court denying a petition to be appointed the administrator *de bonis non* of the estate of a certain intestate on the ground that the petitioner was the son and the only living heir of the intestate, the case was referred to a master to determine the sole question whether the petitioner was the son of the intestate. The master heard the parties and filed a report, in which he found, on evidence not reported, that the petitioner was not the son of the intestate, and later a decree was made confirming the master's report and dismissing the petition. *Held*, that the finding of the master in the absence of any report of the evidence was conclusive, and that the petition was dismissed rightly.

PETITION, filed in the Probate Court for the county of Essex on January 5, 1916, by William Jackson Phillips of Sioux City in the

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State of Iowa, alleging that the petitioner is the son and the only living heir of John C. Phillips, late of Swampscott, who died on June 20, 1896, intestate, and praying to be appointed the administrator *de bonis non* of the estate of such intestate, not fully administered.

The Probate Court made a decree that, "it appearing that the petitioner is not the son of the said John C. Phillips as alleged in said petition, it is decreed that said petition be dismissed."

The petitioner filed a petition for leave to enter late an appeal from the decree of the Probate Court. The case was referrred to a master to determine "the question whether the petitioner is the son of John C. Phillips as alleged in his petition for appointment as administrator." The master filed a report in which he found "that the petitioner is not the son of John C. Phillips of Swampscott," his father having been one John M. Phillips of Illinois.

The petitioner filed exceptions to the master's report. They were heard by *Pierce*, J., who made an interlocutory decree that the exceptions be overruled and the report be confirmed. The petitioner appealed.

Later by order of the single justice a final decree was entered denying the petition for leave to enter late the petitioner's appeal from the decree of the Probate Court denying his petition for appointment as administrator *de bonis non* of the estate of John C. Phillips, and from a decree of the Probate Court denying the petitioner's motion to reopen the hearing on his petition. The petitioner appealed.

S. M. Phillips, for the petitioner.

R. G. Dodge, for the respondent, submitted a brief.

CROSBY, J. On August 3, 1896, Leonard H. Phillips was appointed administrator of the estate of John C. Phillips, late of Swampscott in the county of Essex, by the Probate Court for that county. The administrator, so appointed, died without fully administering the estate, and on January 5, 1916, the petitioner filed in the Probate Court a petition for his appointment as administrator *de bonis non* of the estate on the ground that he was the son and only living heir of the intestate. This petition was dismissed by the judge of probate who found that the petitioner is not the son of the intestate as alleged in the petition.

The petitioner did not appeal from the entry of the decree upon

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the petition, but, after the expiration of the time allowed by statute for the entry of the appeal, filed a petition in this court under R. L. c. 162, § 13, for leave to enter such appeal. Without acting upon this petition, a single justice referred the case to a master to determine the sole question, whether the petitioner is the son of John C. Phillips, as alleged in his petition for appointment as administrator *de bonis non*.

Upon this issue the master heard the parties and filed his report. He found upon the evidence, which is not reported, that the petitioner is not the son of the intestate. The petitioner filed several exceptions to the master's report, which were heard by a single justice of this court and an interlocutory decree has been entered overruling the exceptions and confirming the master's report. As the evidence is not reported, this decree must stand. The finding of the master that the petitioner is not the son of the intestate, in the absence of any report of the evidence, is conclusive; from this finding it appears that the petitioner is not a person who is aggrieved, and is not entitled to be appointed administrator *de bonis non* of the estate.

The entry of the final decree denying the petition for leave to enter late the petitioner's appeal from the decree of the Probate Court denying his petition to be appointed administrator *de bonis non* and his appeal from the decree of that court denying his motion to reopen the hearing on the petition presents no error of law.

The interlocutory and final decrees appealed from must be affirmed.

So ordered.

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WOLF ZIMMERMAN & another *vs.* BESSIE FINKELSTEIN.

Suffolk. February 25, 1918. — April 8, 1918.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Equity Pleading and Practice, Necessary parties. *Equity Jurisdiction*, Mandatory injunction. *Way*, Private.

The owner of the fee in a passageway on which his building abuts may maintain a suit in equity against the owner of a building on the opposite side of the passageway for a mandatory injunction ordering the defendant to remove from his building fire escapes overhanging the plaintiff's land, without joining as parties other persons who have rights of way in the passageway but have no interest in the fee.

BILL IN EQUITY, filed in the Superior Court on October 14, 1915, by the owner of the estate numbered 34 on North Russell Street in Boston, including the fee in the adjoining four foot passageway called Russell Place, against the owner of the building numbered 32 on North Russell Street and adjoining the other side of Russell Place, to restrain the defendant from trespassing upon the plaintiffs' land and for a mandatory injunction ordering the defendant to remove certain fire escapes projecting over and upon the plaintiffs' land.

The defendant demurred to the bill, the first ground assigned for demurrer being as follows: "That the plaintiffs are tenants or owners in common with others entitled to use Russell Place, that the nuisance, if any, is being committed by the defendant, is detrimental and injurious to Russell Place, the property of the plaintiffs and their co-owners or co-tenants, that the co-tenants or co-owners, having a community of interest in the subject matter of this suit, should be made parties hereto."

The demurrer was argued before *Morton*, J., who made an order overruling the demurrer, and the defendant appealed from the order.

The defendant then answered, and the case was referred to a master, who filed a report. Later the case was heard by *J. F. Brown*, J., upon a motion by the plaintiffs for a decree confirming the master's report, and the judge made an interlocutory decree that

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the master's report be confirmed. By order of the judge a final decree was entered ordering the defendant to remove from the passageway known as Russell Place described in the bill "the fire escapes attached to the defendant's building and hanging over and upon said passageway." The defendant appealed.

The case was submitted on briefs.

J. F. Lynch, for the defendant.

A. Stoneman, A. G. Gould & D. Stoneman, for the plaintiffs.

CROSBY, J. The plaintiffs and the defendant are owners of adjoining real estate on North Russell Street in the city of Boston. There is a passageway between the buildings owned respectively by the parties, and this bill is brought to restrain the defendant from maintaining fire escapes on the passageway. The case was referred to a master, who found that the fee in the passageway was owned by the plaintiffs and that the maintenance of the fire escapes by the defendant was without right. He further found that certain easements in the passageway were owned by others as appurtenant to a parcel of real estate at the westerly end of the passageway.

The demurrer to the bill was overruled, and the defendant appealed. An interlocutory decree confirming the master's report was entered, and also a final decree ordering the defendant to remove the fire escapes from her building, from which decree the defendant has appealed.

On this record, the only question of law argued by the defendant is whether the demurrer should have been sustained because of the non-joinder of other parties having easements in the passageway. All other questions are deemed to have been waived by the defendant, but in reaching this conclusion it may be stated that the plaintiffs are entitled to the relief which they seek on the facts as found by the master upon the evidence, all of which is not reported.

"Generally, when several persons have a common interest in the subject matter of the bill, and a right to ask for the same remedy against the defendant, they may properly be joined as plaintiffs." *Cadigan* v. *Brown*, 120 Mass. 493, 494. Such joinder of parties in many cases will prevent a multiplicity of suits and enable a court of equity to administer justice to all the interested parties; but in the case at bar the plaintiffs were not required to

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join the other persons as parties to the bill as they were interested only as owners of an easement in the passageway, and it does not appear upon the record that their rights have been so interfered with as to be entitled to equitable relief, while on the other hand the plaintiffs as owners of the fee in the passageway are entitled to a decree for the removal of the fire escapes if they are maintained unlawfully, as the master has found. *Cadigan* v. *Brown*, *supra*. *Parker* v. *Nightingale*, 6 Allen, 341. *Ballou* v. *Hopkinton*, 4 Gray, 324.

If, as the plaintiffs allege and the master has found, the fire escapes are maintained upon their land unlawfully and they are entitled to their removal, there was no occasion for making others having easements in the way parties to the suit, as it is apparent that complete justice may be done between all parties interested, in one suit. The cases cited and relied on by the defendant are not contrary to the conclusion reached, but are in accord with it. The demurrer was rightly overruled, and the entry must be

Decree affirmed with costs.

MARY ZUGBIE *vs.* J. R. WHIPPLE COMPANY.

Suffolk. March 27, 1918. — April 8, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Negligence, Employer's liability, Of one controlling real estate, Matter of conjecture, Injury from slipping on object whose presence is unexplained.

Where a scrubwoman employed in a hotel was injured by falling when descending a properly lighted flight of stairs in the hotel building by reason of stepping on some "sort of slippery refuse . . . like grease," her employer is not liable for her injury, if there is nothing to show how or when the object on which the woman slipped came upon the stairs.

Collection of cases of personal injuries from falls caused by slipping on objects whose presence was unexplained.

TORT by one employed by the defendant at the Hotel Touraine as a scrubwoman, who was paid $4 a week and also was furnished with a room and board at the hotel, for personal injuries sustained on March 26, 1915, from falling down a flight of stairs in the hotel

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when the plaintiff's foot slipped on the second stair. Writ dated January 4, 1917.

In the Superior Court the case was tried before *Hall*, J. The manner of the plaintiff's accident is described in the opinion. She testified, "That at that time she had no room anywhere else, so that the only place she had as a room was this room which her employer gave her as a part of her wages; that there were eight or nine other scrubwomen who had an arrangement like that; that, when she came into the hotel to go to her room, she came in the kitchen door entrance, which was on a small side street off Lagrange Street; that she then walked along where they washed dishes and began descending the stairs, the dish washing room being situated near the stairway which she had to descend." In regard to her slipping she testified, "That at the time she stepped her right foot down on to the stairs, she felt that there was something under her foot slippery and she did not know anything that happened until she found herself on her back; that she could not see what was on the stair; that the stairs were lighted at the time, the light being overhead toward the lower end of the stairs, there being one electric small bulb light there; that when she got to her room, she noticed that her clothes were soiled; that she could not really tell just what was on the clothes, "it was refuse, sort of slippery refuse, on the clothes, like grease, she should say it was and on the back of the garment she was wearing."

At the close of the plaintiff's evidence the judge, upon the defendant's motion, ordered a verdict for the defendant; and the plaintiff alleged exceptions.

E. H. Savary, for the plaintiff.

E. C. Stone, for the defendant, was not called upon.

By the Court. The plaintiff, while rightfully descending stairs upon the premises of the defendant, her employer, "felt that there was something under her foot slippery" and fell. Later she noticed that upon her clothes there was some "sort of slippery refuse . . . like grease." There was an overhead electric bulb light toward the lower end of the stairs. There is nothing to indicate negligence on the part of the defendant. For aught that appears the object upon which the plaintiff slipped may have been dropped there but a moment before by some one for whose conduct in this respect the defendant was not responsible. The case is

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governed by *Goddard* v. *Boston & Maine Railroad*, 179 Mass. 52, *Lyons* v. *Boston Elevated Railway*, 204 Mass. 227, *Hotenbrink* v. *Boston Elevated Railway*, 211 Mass. 77, *Norton* v. *Hudner*, 213 Mass. 257, and similar cases.

Exceptions overruled.

GEORGE LAWLEY AND SON CORPORATION *vs.* LOUIS F. BUFF.

Suffolk. February 4, 1918. — April 9, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

Frauds, Statute of.

Where, in consideration of the forbearance of the holder of a note made by a certain corporation to bring a suit against the corporation and an individual person to reach and apply in satisfaction of the holder's claim property of the corporation in the hands of the individual person, that person promises to liquidate the note in monthly payments of $100 each, this is a promise to answer for the debt of another within the meaning of R. L. c. 74, § 1, cl. 2.

In an action on a promise to pay a note of a certain corporation held by the plaintiff, in which the defendant pleaded and relied on the statute of frauds, a letter signed by the defendant, referring to a previous correspondence in which the promise was stated, contained the following: "In regard to your statement that I intended to liquidate the old claim of [the plaintiff] against the Imperial Company, — this is correct; but please note that I have changed my mind. . . ." Another letter signed by the defendant, referring to the same correspondence, contained the following: "My verbal promises to Mr. P were definitely qualified and exactly as your letter said: 'That the company's condition would soon enable me to pay the claim.'" *Held*, that there was a sufficient memorandum to satisfy the requirement of the statute of frauds, the unambiguous recognition of the alleged contract being none the less sufficient because the letter of recognition contained an express repudiation of the contract.

CONTRACT for $1,028.64 with interest from November 4, 1913, upon an alleged promise of the defendant to pay the amount due on a certain note of the Imperial Machine, Stamping and Welding Company in monthly payments of $100 each, as stated in the opinion. Writ in the Municipal Court of the City of Boston dated February 28, 1916.

The defendant's answer contained a general denial, and also set up the statute of frauds, averring that the alleged agreement was not in writing and that there was no memorandum of it

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signed by the defendant within the requirement of R. L. c. 74, § 1, cl. 2.

On removal to the Superior Court the case was tried before *Sanderson*, J. At the close of the plaintiff's evidence, which is described in the opinion, the defendant offered no evidence and asked the judge to order a verdict for him. The judge refused to do this.

The defendant then asked the judge to rule that the agreement alleged in the plaintiff's declaration was within the provisions of R. L. c. 74, § 1, cl. 2, and that on the evidence the plaintiff was not entitled to recover. The judge ruled as requested and ordered a verdict for the defendant, the defendant agreeing that, if such ordering of a verdict was wrong and the judge should have ordered a verdict for the plaintiff as a matter of law, or in case there was evidence which should have been submitted to the jury in support of the plaintiff's declaration, judgment should be entered for the plaintiff in the sum of $1,318.19 with interest from the date of the verdict, October 22, 1917, and costs. By agreement of the parties the judge reported the case to this court for determination of the question whether the rulings of the judge should be sustained. If the ordering of the verdict for the defendant was right, judgment was to be entered on the verdict; otherwise, judgment was to be entered in accordance with the agreement of the parties.

J. F. Doherty, for the plaintiff.

W. P. Everts, for the defendant.

PIERCE, J. This is an action to charge the defendant on his promise to pay the plaintiff a sum of money due and payable to the plaintiff on a promissory note of the Imperial Machine, Stamping and Welding Company, in consideration of the forbearance of the plaintiff to bring a suit against the maker of the note and the defendant to reach and apply property of the maker of the note in the possession of the defendant, in satisfaction of the plaintiff's claim on the note. That this was a promise to answer for the debt of another within R. L. c. 74, § 1, cl. 2, is plain.

There is no evidence that the plaintiff, the defendant and the maker of the note ever joined in an agreement whereby the defendant, in consideration of the discharge of the obligation of the maker of the note to the plaintiff, agreed to assume and pay the debt secured by the note. *Griffin* v. *Cunningham*, 183 Mass. 505.

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Nor is there evidence that the forbearance of the plaintiff to attach the interest of the maker of the note in property in the possession of the defendant transferred to the defendant any interest in that property which he did not before possess. *Nelson* v. *Boynton*, 3 Met. 396. *Dexter* v. *Blanchard*, 11 Allen, 365. *Furbish* v. *Goodnow*, 98 Mass. 296. *Ames* v. *Foster*, 106 Mass. 400. *Carleton* v. *Floyd, Rounds & Co.* 192 Mass. 204. See *Paul* v. *Wilbur*, 189 Mass. 48; *Manning* v. *Anthony*, 208 Mass. 399. We do not think the agreement of the defendant was an original promise, if the fact be as alleged, that the plaintiff and the defendant formally agreed to do and forbear in consideration of their mutual promises.

In support of its action the plaintiff introduced in evidence certain letters between its attorneys and the defendant; and the question raised on the report is, whether the letters of the defendant read in connection with the letters of the attorneys (to which they were replies) constitute a memorandum of the agreement sufficient to bind the defendant under the statute of frauds. R. L. c. 74, § 1, cl. 2.

The letter of the defendant dated September 14, 1914, addressed to the attorneys of the plaintiff, so far as material to the issue, reads: "I have your letter of September 10th. As regards the Imperial Machine Company, — I beg to advise that my desires have not changed as regards my intention to pay off the old accounts of the Imperial Company, altho I am only under a moral obligation to do so." The letter of the attorneys dated September 10, 1914, incorporated by reference in the defendant's letter of September 14, reads: "As you will doubtless remember, Mr. Pattison of this office called upon you last November in reply to your letter of November 3rd concerning a claim amounting to $1,028.64 due George Lawley & Son Corporation from the Imperial Machine, Stamping and Welding Company. It was stated to you at that time that we intended to bring suit and attempt to reach certain assets of that company held by the Henrici Laundry Machinery Company, but upon your assurance that by January you would make arrangements so that this claim would be liquidated by payments of $100.00 each, payable each month, we did not bring any proceedings." From both of these letters, which must be read as parts of one and a single instrument, *Lee* v. *Butler*, 167 Mass. 426, *Nickerson* v. *Weld*, 204 Mass. 346, it sufficiently

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appears that George Lawley and Son Corporation in November, 1913, held a claim of $1,028.64 against the Imperial Machine Stamping and Welding Company; that it intended to bring suit and attempt to reach certain assets of that company held by the Henrici Laundry Machinery Company; and that it did not institute any proceedings because of the assurance of the defendant that he would make arrangements so the claim would be liquidated by payments of $100 each, payable each month. In February, 1916, the defendant wrote a letter in answer to a letter of the attorneys, which so far as material reads, "Answering your letter of Feb. 2d, . . . In regard to your statement that I intended to liquidate the old claim of George F. Lawley & Son against the Imperial Company, — this is correct; but please note that I have changed my mind, . . ." On February 24, 1916, the defendant wrote, "Answering your letter of February 15th. . . . My verbal promises to Mr. Pattison were *definitely qualified* and exactly as your letter said: 'That the Company's condition would soon enable me to pay the claim.'"

We think there was a sufficient memorandum to satisfy the requirements of the statute of frauds. The object of the statute is merely to require written evidence signed by the party to be charged. *Hoyle* v. *Hoyle*, [1893] 1 Ch. 84. As the statute affects only the mode of proof, the written unambiguous recognition of the contract and of its terms is sufficient even if it contains an express repudiation of the contract. *Buxton* v. *Rust*, L. R. 7 Ex. 279. *Wilkinson* v. *Evans*, L. R. 1 C. P. 407. *Bailey* v. *Sweeting*, 9 C. B. (N. S.) 843. *Urann* v. *Coates*, 109 Mass. 581, 585.

What we have said disposes of all questions argued on either brief. It follows that a verdict should not have been directed for the defendant, and in accordance with the terms of the report judgment must be entered for the plaintiff in the sum of $1,318.19 with interest from October 22, 1917, and costs.

So ordered.

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ATTORNEY GENERAL *vs.* JOSEPH G. THORP, trustee.

Suffolk. February 5, 6, 1918. — April 9, 1918.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Tax, On legacies and successions. *Power*.

A widow conveyed by deed to her brother certain personal property upon the following trusts: "To pay over the net income therefrom to my daughter, O B V, during her life and in case she has issue surviving her during the continuance of this trust, to pay the net income in equal shares to them. And to pay over the principal, in whole or in part, as a fund to be devoted to such national or philanthropic purpose in Norway associated with the name of my late husband, O B, as my said daughter during her lifetime or by will may direct . . . . In case my said daughter shall die without issue and without directing the payment of said principal, in whole or in part, as above provided, said principal and any accumulation of income thereon shall be paid either in equal shares to the surviving children of my said brother or to the carrying out of the purpose above described, at the discretion of the Trustee." The donor's daughter died without issue and without having exercised either by deed or by will the power of appointment as to the whole or any part of the trust fund. The Attorney General at the relation of the Treasurer and Receiver General brought an information in equity under St. 1909, c. 266, against the brother of the donor as trustee under the deed to recover a legacy and succession tax under St. 1909, c. 527, § 8, on the passing of the property into the control of the defendant by virtue of the failure of the daughter of the donor to exercise the power of appointment given to her by the deed of trust. *Held*, that no legacy or succession tax was due, because no one had become entitled to the possession or enjoyment of the property by reason of the daughter's failure to exercise the power given to her, although thereby a new power of appointment had come into existence.

INFORMATION IN EQUITY, filed by the Attorney General at the relation of the Treasurer and Receiver General on December 18, 1917, for the collection of a legacy and succession tax alleged to be due under St. 1909, c. 527, § 8, by reason of the passing to the defendant of the control of a certain trust fund by virtue of the failure of Olea Bull Vaughan to exercise a power of appointment given to her by a deed of her mother, Sara C. Bull, dated February 5, 1903.

A copy of the deed referred to was attached to the information, the material portion being as follows:

"Be it known that I, Sara C. Bull of Cambridge, Massachusetts,

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hereby give to my brother, Joseph G. Thorp, of said Cambridge, the stocks and bonds hereinafter described to hold and manage as a trust for the following purposes:

"To pay over the net income therefrom to my daughter, Olea Bull Vaughan, during her life and in case she has issue surviving her during the continuance of this trust, to pay the net income in equal shares to them.

"And to pay over the principal, in whole or in part, as a fund to be devoted to such national or philanthropic purpose in Norway associated with the name of my late husband, Ole Bull, as my said daughter during her lifetime or by will may direct. In case my said daughter shall die leaving issue, without directing the payment of said principal, in whole or in part, as above provided, the principal of said fund, in whole or in part, may be paid either to said issue or to the carrying out of the purpose above described, at the discretion of the Trustee. In case my said daughter shall die without issue and without directing the payment of said principal, in whole or in part, as above provided, said principal and any accumulation of income thereon shall be paid either in equal shares to the surviving children of my said brother or to the carrying out of the purpose above described, at the discretion of the Trustee."

The information alleged that Olea Bull Vaughan died without issue and without having exercised either by deed or by will the power of appointment as to the whole or any part of the trust fund.

The case came on to be heard before *De Courcy*, J., who at the request of the parties reserved it upon the information and the answer for determination by the full court, the parties agreeing that this court might draw inferences of fact from any of the facts stated in the pleadings.

W. H. Hitchcock, Assistant Attorney General, for the plaintiff.

E. M. Parker, for the defendant.

PIERCE, J. This is an information in equity brought under St. 1909, c. 266, to recover a legacy and succession tax alleged to be due from the defendant as the trustee under a deed. The case was reserved by a single justice of this court "upon the information and the answer, the parties agreeing that the court may draw inferences of fact from any of the facts stated in the pleadings."

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The question is, whether so much of the fund as was invested in bonds of any corporation, in the shares of stock in Massachusetts real estate trusts, and cash on deposit in a Massachusetts trust company, was subject to a legacy and succession tax under St. 1909, c. 490, Part IV, as modified and extended by St. 1909, c. 527, § 8, as property passing to the appointees of the defendant by virtue of the failure of Olea Bull Vaughan to exercise the power of appointment granted to her by the deed of trust.

It is the contention of the Attorney General that the fund held by the defendant is subject to a legacy and inheritance tax by reason of the provision contained in St. 1909, c. 527, § 8, to the same extent as it would have been taxable had Mrs. Vaughan, acting under that power, directed by her will that it should be paid either to the surviving children of the defendant or to the carrying out of the purpose described in the trust deed at the discretion of the defendant. On the other hand, the defendant contends that the provision of the statute that "a disposition of property taxable under the provisions of chapter five hundred and sixty-three of the acts of the year nineteen hundred and seven and all acts in amendment thereof and in addition thereto shall be deemed to take place to the extent of such omission or failure in the same manner as though the persons or corporations thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure" refers and is limited to "only an interest which is contingent upon the conduct of the donee of the power, who can make it vest in them absolutely in possession, or can defeat it altogether." *Minot* v. *Treasurer & Receiver General*, 207 Mass. 588, 591. And the defendant further contends that no person or corporation whatever became entitled to the possession and enjoyment of the fund or had succeeded to the title thereto by reason of the failure of Mrs. Vaughan to exercise the power, and argues that a succession and enjoyment only occurred, or could occur, when the trustee deriving power upon the failure of Mrs. Vaughan to direct the payment of the principal, exercised that power and appointed the entire trust fund to a public charity within the purpose of the grantor of the

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power or paid the principal of the fund in equal shares to the surviving children of the trustee.

We are of opinion that the contention of the defendant is correct. Neither the children of the trustee nor the public charity could take upon the death of the first donee, if such donee failed to exercise the power; and the trustee did not become the donee of the power under the will by the failure of the donee to direct the payment of the principal, because the power of the donee to create a charitable trust was limited to that purpose, and because the grantor by the trust instrument had determined that the trustee should become the donee of the power in the event of the failure of the original donee to act in her lifetime or by will.

The tax has not been assessed upon the basis of an appointment by the trustee by deed under St. 1909, c. 527, § 8, and we therefore do not determine whether such a tax may be imposed.

It follows that the information must be dismissed with costs.

Decree accordingly.

MARY L. BIRD & another *vs.* JOHN C. JOHNSTON.

Suffolk. February 25, 1918. — April 9, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

Equity Pleading and Practice, Indorser of bill. *Scire Facias*, For costs in suit in equity. *Estoppel.*

Under R. L. c. 173, § 39, one who writes his name on the back of a bill in equity brought by a plaintiff not an inhabitant of this Commonwealth becomes an indorser liable for costs.

In an action of scire facias against the indorser of a bill in equity for costs ordered to be paid by the plaintiff in such suit, the defendant in scire facias is bound conclusively by the record in the suit in equity; and, where the bill that he indorsed describes the plaintiff in equity as a resident of another State, the defendant at the trial of the scire facias cannot be allowed to show that the plaintiff in the suit in equity was an inhabitant of this Commonwealth when the bill in equity was filed.

In such an action of scire facias a finding of the jury in answer to a special question of the court, that the plaintiff in the suit in equity was an inhabitant of this Commonwealth at the time of the filing of the bill, must be disregarded as of no effect.

Under R. L. c. 173, § 39, which makes the indorser of a bill in equity liable to pay

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all costs which may be awarded against the plaintiff "in case of avoidance or inability of the plaintiff," a statement in the return of the officer on the execution for costs, that he "made diligent search for the goods, chattels, or lands of the within named [plaintiff in equity], the judgment debtor, but could find none within my precinct," is some evidence of such "avoidance or inability" and warrants a special finding of the jury that the plaintiff in equity was unable to pay the amount of the execution for costs.

SCIRE FACIAS against the indorser of a bill in equity for the costs awarded in the suit instituted by such bill against the present plaintiffs by one Florence J. Grant. Writ of scire facias dated February 26, 1915.

In the Superior Court the case was tried before *Hitchcock*, J.

At the trial the plaintiffs introduced in evidence the bill in equity, which was filed on July 15, 1914, and in which Florence J. Grant was described as of Freeport, in the county of Cumberland and State of Maine, and these plaintiffs were described as of Boston, Massachusetts. On the back of the bill, in the defendant's handwriting, was the following indorsement: "From the office of J. C. Johnston, 421 Tremont Building," he being an attorney at law. The plaintiffs also showed that on November 30, 1914, a final decree was entered dismissing the bill with costs amounting to $63.61. The plaintiffs also introduced in evidence the execution for the costs issued against Florence J. Grant in behalf of the plaintiffs in this action, the execution being dated December 21, 1914, and returned to court on February 24, 1915, by one Gast, who was admitted to be a duly qualified constable of Boston, and who indorsed on the execution the following return: "Suffolk, ss. Boston, February 19, 1915. By virtue of this execution, on the 31st day of December, 1914, and again on the 1st day of January, 1915, and again on the 15th day of February, 1915, I made diligent search for the goods, chattels, or lands of the within named Florence J. Grant, the judgment debtor, but could find none within my precinct; I therefore return this execution to court in no part satisfied." No demand ever was made upon Florence J. Grant for the amount of the execution.

There was evidence from which the jury could find that Florence J. Grant resided continuously in Boston from the date of the issuance of the execution until the time of her death in September, 1916; and that during all that time she was the owner of an equity in real estate in Freeport in the county of Cumberland and State

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of Maine. There was evidence that this was worth $500. There was no other evidence upon the question of her financial ability to pay the execution except the officer's return in the suit of Grant against Bird et al. The plaintiffs offered in evidence a sealed envelope with a post office date stamped thereon, addressed to Florence J. Grant, 554 Columbus Avenue, Boston, alleged to contain a letter to her, bearing upon its face a statement to the effect that the letter was unclaimed and that the addressee could not be found and that the letter was returned to the writer. There was no evidence offered as to who stamped on the envelope the statement that the addressee could not be found. The defendant excepted to the admission of the envelope in evidence. The plaintiff Hopwood was allowed to testify that he wrote and sent the letter and to the contents of the letter alleged to be contained in the envelope, although he admitted that he had made a copy thereof and did not know where the copy was, but was permitted to testify that the letter inside the envelope was a demand upon Mrs. Grant for the payment of the execution. The defendant excepted to the admission of this testimony. A witness called by the plaintiffs testified that he had called at the home of Florence J. Grant at 554 Columbus Avenue and had seen one Mrs. Saulnier. Against the objection of the defendant he was allowed to testify that Mrs. Saulnier told him that Mrs. Grant was not there and that she did not know where she was. This was offered to contradict Mrs. Saulnier's testimony that at that time Mrs. Grant boarded at her house, also to show the efforts made by the plaintiffs to find Mrs. Grant. The defendant excepted to the admission of this testimony.

The defendant asked the judge to instruct the jury as follows:

"1. That, unless it appears that the plaintiff in the suit in equity brought by Florence J. Grant against Mary L. Bird and John H. Hopwood was not an inhabitant of the Commonwealth, the defendant is entitled to" [prevail.]

"2. That, unless it appears that the plaintiff in the suit in equity brought by Florence J. Grant against Mary L. Bird and John H. Hopwood was not an inhabitant of the Commonwealth at the time of the entry of said suit, the defendant is entitled to" [prevail.]

"3. That the burden is upon the plaintiffs in this action to establish by a fair preponderance of the evidence that the plaintiff

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in the suit in equity of Grant against Bird and Hopwood was not an inhabitant of this Commonwealth.

"4. That the burden is upon the plaintiffs in this action to establish by a fair preponderance of the evidence that the plaintiff in the suit in equity of Grant against Bird and Hopwood was not an inhabitant of this Commonwealth at the time of the entry of said suit.

"5. That the burden is upon the plaintiffs in this action to establish by a fair preponderance of the evidence that Florence J. Grant, the plaintiff in the suit in equity of Grant against Bird and Hopwood, avoided the payment of the judgment therein or was unable to pay said judgment.

"6. An officer's return that he has made diligent search for the property of the plaintiff upon which to levy the amount of said judgment is no evidence that the plaintiff in said suit avoided the payment of the judgment against her.

"7. An officer's return that he has made diligent search for the property of the plaintiff upon which to levy the amount of said judgment is no evidence that the plaintiff in said suit avoided the payment of the judgment against her where the plaintiff was residing in the Commonwealth from before the time of the commencement of said suit until the time of her death in September, 1916.

"8. An officer's return that he has made diligent search for the property of the plaintiff upon which to levy the amount of said judgment is no evidence that the plaintiff in said suit avoided the payment of the judgment against her where the plaintiff was residing in the Commonwealth from before the time of the commencement of said suit until the time of her death in September, 1916, when the fact of her residence was known to the plaintiffs in this action.

"9. An officer's return that he has made diligent search for the property of the plaintiff upon which to levy the amount of said judgment is no evidence of the inability of the plaintiff in the suit in equity of Grant against Bird and Hopwood to pay the amount of the judgment awarded against her where the plaintiff resided in the Commonwealth from before the time of the commencement of said suit until the time of her death in September, 1916.

"10. If the jury finds that Mrs. Florence J. Grant, the plaintiff in the original suit, was an inhabitant of the Commonwealth at the

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time of the entry of the bill in equity in the case of Grant against Bird and Hopwood, and continued to reside therein until the time of her death, September 8, 1916, the plaintiffs must show that they used reasonable diligence to collect the amount of their judgment for costs from her before they are entitled to recover against the defendant in this case.

"11. If the jury finds that Mrs. Florence J. Grant, the plaintiff in the original suit, was an inhabitant of the Commonwealth at the time of the entry of the bill in equity in the case of Grant against Bird and Hopwood, and continued to reside therein until the time of her death, September 8, 1916, the plaintiffs must show that they used reasonable diligence to collect the amount of their judgment for costs from her before they are entitled to recover against the defendant in this case, and the officer's return upon the execution in the case of Grant against Bird et al. is not enough to establish the fact of such reasonable diligence.

"12. If the jury finds that Mrs. Florence J. Grant, the plaintiff in the original suit, was an inhabitant of the Commonwealth at the time of the judgment against her for costs in the suit in equity of Grant against Bird et al. and continued to reside therein until the time of her death, September 8, 1916, the plaintiffs must show that they used reasonable diligence to collect the amount of their judgment for costs from her before they are entitled to recover against the defendant in this case.

"13. If the jury finds that Mrs. Florence J. Grant, the plaintiff in the original suit, was an inhabitant of the Commonwealth at the time of the judgment against her for costs in the suit in equity of Grant against Bird et al. and continued to reside therein until the time of her death, September 8, 1916, the plaintiffs must show that they used reasonable diligence to collect the amount of their judgment for costs from her before they are entitled to recover against the defendant in this case, and the officer's return upon the execution in the case of Grant against Bird et al. is not enough to establish the fact of such reasonable diligence.

"14. Upon all the evidence the plaintiffs are not entitled to recover."

The presiding judge refused all these requests for instructions and instructed the jury, among other things, that the officer's return upon the execution issued in the suit of Grant against Bird

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et al. was some evidence that the plaintiff in that suit was unable to pay the amount of the execution.

The presiding judge submitted to the jury three questions, which with the answers of the jury were as follows:

"1. Was Florence J. Grant an inhabitant of the Commonwealth at the time of the filing of the bill in equity in the suit of Grant against Bird et al?" The jury answered, "Yes."

"2. Was Florence J. Grant an inhabitant of the Commonwealth during the life of the execution issued in said suit?" The jury answered, "Yes."

"3. Was Florence J. Grant unable to pay the amount of said execution?" The jury answered, "Yes."

Thereupon the judge ruled that the defendant was bound by the record in the suit of Grant against Bird and could not contradict that record and instructed the jury to find a verdict for the plaintiffs in the sum of $71.24. The defendant alleged exceptions.

R. L. c. 173, § 39, is as follows: "Original writs, writs of audita querela, writs of scire facias by private persons on judgment or recognizance, writs of error in civil cases, writs of and petitions for review, petitions for partition in the Superior Court, petitions to establish liens on buildings and land, petitions for certiorari or mandamus and bills in equity, in which the plaintiff is not an inhabitant of the Commonwealth, shall, before the entry thereof, be indorsed by a responsible person who is such inhabitant; but if one of the plaintiffs is such an inhabitant, the process need not be so indorsed. Every indorser, in case of avoidance or inability of the plaintiff, shall be liable to pay all costs which may be awarded against the plaintiff if an action therefor is commenced within one year after the original judgment."

The case was submitted on briefs.

J. C. Johnston, pro se.

C. W. Cushing & J. H. Hopwood, for the plaintiffs.

De Courcy, J. Florence J. Grant, the plaintiff in the original bill in equity, was therein described as of Freeport in the county of Cumberland and State of Maine. By placing his name on the back of the bill the present defendant, John C. Johnston, became an indorser for costs under R. L. c. 173, § 39. *Wheeler* v. *Lynde,* 1 Allen, 402. *Johnson* v. *Sprague,* 183 Mass. 102. This writ of scire facias against the indorser is based upon the record in the

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original suit, and the record in that suit is conclusive against him in this proceeding. It was not open to him to show that Florence J. Grant was an inhabitant of this Commonwealth at the time when she filed her bill in equity; and the first answer of the jury must be disregarded. This disposes of the requests for instructions numbered 1, 2, 3, 4, 10 and 11. *M'Gee* v. *Barber*, 14 Pick. 212. *Sherburne* v. *Shepard*, 142 Mass. 141. *Savage* v. *Blanchard*, 148 Mass. 348, 350.

A final decree dismissing the bill with costs was entered in the original suit. The statute made the indorser liable for the costs, as surety, "in case of avoidance or inability of the plaintiff." *Ruggles* v. *Ives*, 6 Mass. 494. The officer's return on the execution, that he "made diligent search for the goods, chattels, or lands of the within named Florence J. Grant, the judgment debtor, but could find none within my [his] precinct," was some evidence of such "avoidance or inability;" and the jury specially found that she was unable to pay the amount of the execution for costs. This renders the sixth, seventh and eighth requests immaterial; and the ninth was rightly refused. *Davis* v. *Whithead*, 1 Allen, 276. *Wixon* v. *Lapham*, 5 Allen, 206.

No exception was taken to the instructions given by the presiding judge, and it is to be assumed that the subject matter of the fifth, twelfth and thirteenth requests was dealt with properly. The liability of the indorser was established by the special finding of the jury, that the judgment debtor was unable to pay the costs, and there was no error in directing a verdict for the plaintiffs.

It is apparent from the answers of the jury that the defendant was not harmed by the evidence as to the registered letter addressed to Mrs. Grant. The evidence of statements made by Mrs. Saulnier was competent for the limited purpose for which it was admitted. It follows that the entry must be

Exceptions overruled.

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FRANCIS E. McCARTHY *vs.* JAMES B. RENDLE & others.

Suffolk. March 13, 1918. — April 9, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, & PIERCE, JJ.

Insurance, Against liability: notice. *Equity Jurisdiction*, To reach and apply casualty insurance to satisfaction of judgment for bodily injury.

In a suit in equity under St. 1914, c. 464, by one who had recovered judgment against certain bridge builders for bodily injuries, to reach casualty insurance in a certain insurance company and apply it to the satisfaction of such judgment, the insurance policy on which the claim was brought contained the following condition: "The assured upon the occurrence of an accident shall give immediate notice thereof to the Company, or to its authorized Agent, with the fullest information obtainable. He shall give like notice with full particulars of any claim made on account of such accident. . . ." It appeared that the plaintiff was an inspector in the employ of the metropolitan park commission and that on a certain day his leg was scalded by a jet of steam or boiling water coming from an engine operated by workmen of the bridge builders who were constructing a bridge for that commission, that immediately upon receiving the injury the plaintiff walked away from the job unaided, had his leg bandaged at the office of the commission and went home, that the next day he returned to work and remained on the job for eight days, when his leg became worse and he went home, that he remained at home for twelve days, that during this time he called in attorneys, and that they on the last of the twelve days mailed a letter to the bridge builders containing a full statement of the accident and of his claim and that two days later the bridge builders sent to the insurance company a letter enclosing the letter of the attorneys, which was received in due course, that the plaintiff did not notify the bridge builders that he was injured nor make any claim for his injury until the letter of his attorneys was sent to them, but that the foreman of the bridge builders learned of the injury at some time during the day on which it happened and notified the bridge builders of it within a week, who assumed from the fact that the plaintiff had gone back to his work and had made no complaint that his injury was a trifling one. *Held*, that there could be no recovery on the policy because the condition in regard to notice was not complied with, the policy having required immediate notice of the occurrence of an accident, regardless of any claim for damages or the amount of damages sustained, and such requirement being a reasonable one.

In the case above described it was *pointed out* that the fact, that the person injured had a reasonable and *bona fide* doubt as to the existence of any injury or any liability, could not deprive the insurer of its contractual right under the policy to have immediate notice of the occurrence of an accident regardless of any claim that might be founded on it.

BILL IN EQUITY, filed in the Superior Court on October 30, 1917, under St. 1914, c. 464, by Francis E. McCarthy, who had

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recovered judgment against the defendants Rendle and Stoddard, a firm of bridge builders, for bodily injuries, to reach and apply to the satisfaction of such judgment casualty insurance of those defendants in the defendant insurance company.

In the Superior Court the case was heard by *Fox*, J., who made a memorandum of decision containing the facts that are stated in the opinion. Upon these facts the judge found that the requirements of the policy respecting notice had been complied with, and that the plaintiff was entitled to a decree. At the request of the defendant insurance company he reported the case for determination by this court. If the ruling of the judge was correct, a decree was to be entered in favor of the plaintiff McCarthy in the sum of $1,547.10 with interest from September 24, 1917, together with costs. If the ruling was wrong as a matter of law, a decree was to be entered dismissing the bill with costs to the defendant insurance company.

L. C. Doyle, for the defendant insurance company.

L. Withington, (*W. R. Sears* with him,) for the plaintiff.

PIERCE, J. This is a bill in equity under St. 1914, c. 464, to recover against the Travelers Insurance Company a judgment debt which the plaintiff previously had obtained against the defendants Rendle and Stoddard in an action at law.

It was agreed at the trial that the Travelers Insurance Company had on January 6, 1915, in full force and effect a policy of liability insurance insuring Rendle and Stoddard, a co-partnership, from loss or damage caused by injuries to the public for which they might be liable, and that this policy covered the liability of Rendle and Stoddard for the accident to the plaintiff. The policy contained the following provision: "This agreement is subject to the following conditions: . . . D—The assured upon the occurrence of an accident shall give immediate written notice thereof to the Company, or to its duly authorized Agent, with the fullest information obtainable. He shall give like notice with full particulars of any claim made on account of such accident. . . ." The presiding judge found as a fact that there was no waiver, and at the request of the Travelers Insurance Company reported the case to this court to determine whether "upon my findings of facts, my ruling that the requirements of the policy respecting notice have been complied with, is correct."

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The reported facts are as follows: On January 6, 1915, the plaintiff's leg was scalded by a jet of steam or boiling water coming from an engine operated by one of Rendle and Stoddard's workmen. The plaintiff was an inspector working for the metropolitan park commission, and Rendle and Stoddard were contractors who were constructing a bridge for the commission. "Immediately upon receiving the injury McCarthy walked away from the job unaided, had his leg bandaged at the office of the commission, and went home. The next day he returned to work and remained upon the job until January 14, when, his leg becoming worse, he went home and remained at home until after January 26. Between January 14 and January 26 he called in attorneys, and they, on January 26, mailed a letter to Rendle and Stoddard containing a full statement of the accident and the claim, and on January 28 Rendle and Stoddard sent to the insurance company a letter enclosing the letter of the attorneys, which was received by the company January 29. No claim is made that this notice when received was not a sufficiently full notice of the nature of the accident and of the claim. But this was the first notice of the accident received by the company and upon its receipt the company objected that it came too late. McCarthy did not notify Rendle and Stoddard that he was injured, nor make any claim for his injury before the letter of his attorneys was sent to them. They learned of the occurrence from their foreman (who, it is agreed, was not present at the time, but learned of it during the same day), within a week after January 6. They assumed, however, and had a right to assume, from the fact that McCarthy was back upon his job and made no complaint, that his injury was trifling."

The question presented is whether the fact, found by the judge, that "they [Rendle and Stoddard] assumed, . . . and had a right to assume, from the fact that McCarthy was back upon his job and made no complaint that his injury was trifling," was a sufficient justification as a matter of law for their failure to give notice of "the occurrence of an accident" for a period of at least fifteen days after "they learned of the occurrence from their foreman."

Within the week after January 6, 1915, and between January 14 and 28, 1915, when they gave notice of the accident to the

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insurance company, Rendle and Stoddard knew of the "occurrence of the accident," that is, they knew that the plaintiff on January 6, 1915, had had his leg "scalded by a jet of steam or boiling water" coming from an engine operated by one of their workmen. In passing, it must be said that in the reported facts there is not the slightest support for the suggestion of the plaintiff that the phrase "the occurrence" used by the judge in "they learned of the occurrence from their foreman," was intended by him to summarize or characterize a series of events having their origin as a practical joke upon the plaintiff as the victim. Differing from policies that provide for "immediate notice" "upon the occurrence of an accident, and upon notice of any claim on account of an accident," *Anoka Lumber Co.* v. *Fidelity & Casualty Co. of New York*, 63 Minn. 286, which hold that the assured need not give notice until a claim is presented, but see *Underwood Veneer Co.* v. *London Guarantee & Accident Co. Ltd.* 100 Wis. 378; 11 Ann. Cas. 258, note, and cases collected, the policy in suit provides for immediate notice of "the occurrence of an accident" regardless of any claim for damages or of the amount of damage sustained or claimed. The policy then provides that the insured "shall give like notice with full particulars of any claim made on account of such accident." The reason for the first of the conditions is plain. The occurrence of an accident and injury, however slight, may result in litigation, even in protracted litigation. It is the experience of every defender of causes that it is a matter of first importance to become possessed of all material facts and of the names and residences of all known witnesses at the earliest possible moment, as facts may be forgotten or distorted and witnesses may go beyond reach. It is an important provision in that it is "for the protection of the insurer against fraudulent claims, and also against those which, although made in good faith, are not valid." *Hatch* v. *United States Casualty Co.* 197 Mass. 101, 105, 106.

If we assume that the first knowledge of the "occurrence of an accident" which the insured had was on January 13, 1915, the last day of the week following the accident, the condition of the policy required that they should then "give immediate written notice thereof to the Company." Notice was not given until January 28, 1915. It is not contended that the failure to comply

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with the requirements of the policy was due to ignorance of the occurrence of the accident, as was the case in *Mandell* v. *Fidelity & Casualty Co.* 170 Mass. 173, or that from the nature of the accident it was reasonably impossible during the period to determine whether there was or would be any bodily injury, as was the case in *H. P. Hood & Sons* v. *Maryland Casualty Co.* 206 Mass. 223, 226. For the application of a like rule under the workmen's compensation act see *Johnson's Case*, 217 Mass. 388; *Carroll's Case*, 225 Mass. 203. It is plain that the fact, that the insured has a reasonable and *bona fide* doubt as to the existence of any injury or of any liability, cannot be used to deprive the insurer of his contractual right to have an immediate notice of the occurrence of an accident, regardless of the damages that may be claimed to flow from that accident.

We are of opinion that the ruling was wrong as a matter of law, and in accordance with the terms of the report a decree must be entered dismissing the bill with costs as to the defendant insurance company.

Decree accordingly.

MARGARET E. CONNOR *vs.* FRANCIS M. O'DONNELL.
JOSEPH J. CONNOR *vs.* SAME.

Middlesex. February 4, 1918. — April 18, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

Physicians and Surgeons. Negligence, Of physician. *Evidence,* Opinion: experts.

In an action by a married woman against a physician for alleged negligent professional treatment of the plaintiff after she had been delivered of a child, it was *held* that there was evidence to support a specification that one shoulder of the plaintiff was fractured and her other shoulder dislocated by holding her wrists under the direction of the defendant to restrain her while she was having convulsions.

In the same case it also was *held* that there was evidence to support another specification that the defendant was unskilful and negligent in failing to discover the condition of the plaintiff's shoulders as described above and causing her great pain by directing that they should be manipulated.

A medical or other expert cannot be allowed to be asked to give his opinion founded on "the evidence in the case," unless such evidence is admittedly capable of only one interpretation, which here was not the case.

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TWO ACTIONS OF TORT against a physician, the first by a married woman for alleged negligent professional treatment, and the second by her husband for consequential damages. Writs dated March 12, 1915.

The defendant moved for specifications, and the plaintiff filed specifications, which are described in the opinion.

In the Superior Court the case was tried before *Wait*, J. The evidence is described in the opinion. The question which the judge allowed to be put to Dr. Jefferson, subject to the defendant's exception, there is quoted. At the close of the evidence the judge refused to order verdicts for the defendant, and thereupon the defendant in each case asked the judge to instruct the jury as follows:

"There is no evidence to support the first of the two specifications."

"There is no evidence to support the second of the two specifications."

The judge refused to give either of these instructions and submitted the cases to the jury.

The jury returned a verdict for the plaintiff in each case, in the first case in the sum of $4,500 and in the second case in the sum of $500. The defendant alleged exceptions.

P. E. Costello, for the defendant.

E. C. Jenney, (*S. Robinson* with him,) for the plaintiffs.

CROSBY, J. The plaintiff in the first action seeks to recover damages from the defendant, a physician, for alleged negligence in his treatment and care of her after she had given birth to a child. She will hereinafter be referred to as the plaintiff. The second action is brought by the husband of the plaintiff in the first action to recover consequential damages.

The plaintiff filed specifications of the unskilfulness and negligence of the defendant, alleged in her declaration in substance as follows: the first specification alleged that the defendant negligently directed that the plaintiff, while suffering from convulsions following childbirth, be restrained and held in bed by holding her by her wrists, whereby her shoulders became dislocated and fractured; the second specification alleged that after the plaintiff's shoulders had been fractured and dislocated, the defendant failed to discover her injuries and negligently pre-

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scribed treatment which caused her great pain and resulted in permanent disabilities.

The plaintiff testified that she went to bed at about two o'clock in the morning of December 30, 1913, and was unconscious during the birth of her child; that she did not regain consciousness for a period of from twenty-four to forty-eight hours, and immediately thereafter she felt severe pains in her shoulders, "causing her terrible agony to move her fingers or hands."

The defendant testified that he went to the plaintiff's house at about half past seven o'clock on the morning of December 30, and found her suffering from violent convulsions; that she was unconscious; that he gave her injections of morphia to relieve her, and in order to restrain her that he and the nurse held her by the wrists. There was also evidence that the defendant directed the plaintiff's husband so to hold her if she had further convulsions; the husband testified that during the evening of the same day she had thirteen convulsions, and that on those occasions he held her in bed by her wrists. There was evidence that her shoulders had never been injured before she became unconscious. It appears from the undisputed evidence that about two weeks after the child was born, one of her shoulders was discovered to be fractured and the other dislocated.

While there was evidence from which the jury could have found that her injuries might have been caused solely by the convulsions, still there was other evidence to show that such injuries were due to holding her wrists to restrain her and that she was so held by the defendant's direction. On this conflicting testimony it could not have been ruled that there was no evidence to support the allegations of the first specification.

There was evidence that, after she became conscious and while her shoulders were in the condition above described, the defendant directed that they be manipulated, that by reason of such treatment she was caused great pain, and that the defendant at that time had failed to discover the fracture and dislocation; also, that such treatment was unskilful and negligent. This evidence was sufficient to support the allegations of the second specification.

The record shows that the presiding judge instructed the jury as to the duty required of an attending physician, and it is not contended that those instructions were not correct and sufficient. It

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follows that the requests for rulings that there was no evidence to support the specifications were rightly refused. The motion to direct a verdict for the defendant in each case was denied properly.

The remaining exceptions relate to questions put to Dr. Jefferson, a medical expert called by the plaintiff. He was asked on direct examination, "Now coming to the left shoulder, Doctor, from your examination of the plate and Mrs. Connor and the evidence in the case, have you formed any opinion as to the cause of the present condition?" The exception to the admission of this question must be sustained. It is settled that an expert witness cannot be asked or allowed to express an opinion founded in whole or in part on the evidence where, as in the case at bar, it was conflicting. An important question at the trial was whether the fracture and dislocation of the plaintiff's shoulders was due to the convulsions alone or resulted from the convulsions together with the physical restraint exercised upon her by the defendant or under his direction.

It was said by this court in *Stoddard* v. *Winchester*, 157 Mass. 567, at page 575: "The proper way to interrogate an expert, to obtain his opinion on facts to be derived from testimony, is to put questions on hypothetical statements of facts, or to ask the witness to give opinions founded on possible views of the evidence, stating in connection with the opinions the hypothetical facts to which they relate, so as to make them intelligible. An expert witness cannot be asked to give an opinion founded on his understanding of the evidence, against the objection of the other party, except in cases where the evidence is capable of but one interpretation. In other words, questions must be so framed that the witness will not be called upon to give an answer involving his opinion on disputed questions of fact which are not proper subjects for the testimony of an expert, nor to intimate to the jury his opinion as to the credibility of any of the witnesses." *Hunt* v. *Lowell Gas Light Co.* 8 Allen, 169. *Chalmers* v. *Whitmore Manuf. Co.* 164 Mass. 532. *McCarthy* v. *Boston Duck Co.* 165 Mass. 165. *Rafferty* v. *Nawn*, 182 Mass. 503, 507. *Burnside* v. *Everett*, 186 Mass. 4. *Commonwealth* v. *Johnson*, 188 Mass. 382, 386. Wigmore on Evidence, § 681.

The exceptions not argued are treated as waived, the others need not be considered in detail as we do not perceive any error in the rulings of the presiding judge.

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As the witness Jefferson was allowed to express an opinion founded in part on "the evidence in the case" which was conflicting, the exception thereto must be sustained; the others are overruled.

Exceptions sustained.

NEWTON H. FOSTER *vs.* C. G. HOWES COMPANY.

Suffolk. February 5, 1918. — April 18, 1918.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Corporation, Officers and agents.

Where all the stock of a corporation engaged in the business of cleansing and dyeing was held by five persons, all of whom were its officers and directors, and at a directors' meeting at which all the directors and consequently all the stockholders were present it was voted unanimously that any net earnings in excess of the amount required to pay a dividend of eight per cent per annum on the capital stock of this company should be distributed in the proportion of three fifths of such net earnings to the president, one fifth to the vice-president and one fifth to the assistant treasurer, and where this action afterwards was ratified by unanimous votes at subsequent meetings of the stockholders and the directors, it was *held* that there was nothing unlawful in the payment of the officers in this manner and that the assistant treasurer was entitled to the share of the net profits voted to him.

It appeared that the assistant treasurer of the corporation described above was credited on the books of the company with the amount of $3,403, which he was entitled to receive as additional salary under the votes of the directors and the stockholders, and that the assistant treasurer under an arrangement made between him and the treasurer, who purchased his shares in the corporation, accepted notes of the corporation of the face value of $2,000 in full satisfaction and discharge of his entire demand against the company. The notes were executed by the treasurer, were entered on the books of the corporation by the bookkeeper under instructions of the president, and on the same day the vice president was told that the notes had been given in settlement of the former assistant treasurer's account. The first four of these notes to fall due, amounting to $400, were paid at maturity and before any of them was paid a majority of the directors and of the stockholders knew of the existence of the notes and the purpose for which they had been given and no question was raised as to their validity, until the former assistant treasurer brought an action on other of these notes amounting to $500. An auditor to whom the action was referred found that "the act of signing and delivery of the notes was fully ratified by the directors and stockholders, and therefore by the company itself, and that the right of the company to avoid the contract thus made, if such right ever existed, has been waived, and the notes in suit are valid outstanding obligations of the defendant." *Held*, that this finding of the auditor was warranted by the evidence.

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CONTRACT against the C. G. Howes Company, a corporation, on three promissory notes made by that company and signed by its treasurer, due, respectively, $200 on March 15, 1916, $100 on April 15, 1916, and $200 on May 14, 1916. Writ dated May 18, 1916.

The case was referred to an auditor, who made a report containing the findings that are stated in the opinion.

The case was heard upon the auditor's report by *Aiken*, C. J., without a jury. The defendant asked the Chief Justice to make the two rulings which are quoted in the opinion. The Chief Justice refused to make either of these rulings and found for the plaintiff in the sum of $529.33. The defendant alleged exceptions.

J. W. Morton, for the defendant.

F. Burke, (*J. P. Bell* with him,) for the plaintiff.

PIERCE, J. The defendant company was incorporated under the laws of this Commonwealth for the purpose of engaging in the business of cleansing, dyeing, laundering and renovating wearing apparel and for other kindred purposes. Its entire capital, $20,000, represented by two hundred shares of stock of the par value of $100, was used in the purchase of the personal property and good will of a business owned and conducted by one Clarence G. Howes under the name and style of the C. G. Howes Company. The stock of the company when issued was allotted one hundred and ninety-eight shares to Clarence G. Howes, one share to Lindsey K. Foster, and one share to Horace G. Pender. The shares held by Foster and Pender were transferred to them by Howes to enable Pender and Foster to qualify as directors.

On May 8, 1912, upon the organization of the corporation Alfred Hopkins, Jr., and Newton H. Foster became stockholders and the number of stockholders was thereby increased from three to five. The by-laws adopted provided "for a board of five directors who, among other things, were to have the general direction, management and control of the business and its officers, agents and servants; to have and exercise all powers and authorities not otherwise delegated by law or by the by-laws; to declare dividends of surplus profits whenever deemed expedient; to have access to all books and papers of the company, its officers and agents; to fix all salaries, including their own; to present financial reports at the annual meetings of stockholders. Other

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than as stated, the by-laws contained no further reference to the matter of dividends."

They provided in addition "for a president, vice-president, treasurer, assistant treasurer and clerk, and prescribed their respective duties and powers. The treasurer was given custody of the corporate funds, power to receive all moneys and make disbursements as directed, to sign certificates of stock, draw checks and drafts for the transaction of business, to deposit money, draw checks and indorse for deposit checks, notes and drafts received. He was directed to keep correct books of account in such form as the directors should prescribe. He was given no express power to execute or deliver notes on behalf of the corporation, nor was such power conferred upon him by vote or otherwise."

The fiscal year of the corporation terminated on March 1, and the date of the annual meeting was fixed on the second Thursday in March of each year. Upon organization every stockholder became a director. Howes became president and treasurer, Pender clerk, Newton H. Foster assistant treasurer and Hopkins vice president.

At a directors' meeting held on May 15, 1912, all directors, and consequently all stockholders, being present, the compensation or salaries of the various officers were fixed by unanimous vote; and it was further provided "and as an additional salary, any net earnings in excess of the amount required to pay a dividend of 8% per annum on the capital stock of this company, to be divided in the proportion of three fifths of such net earnings to the President and Treasurer, Mr. Howes, one fifth to the Vice-President, Mr. Hopkins, and one fifth to the Assistant Treasurer, Mr. Foster."

In July, 1912, the board of directors voted that the plaintiff's salary, as assistant treasurer, be fixed at $1,040 "with the additional salary as stated in the vote of the Board of Directors passed at the meeting of May 15th, 1912."

At the annual meeting of stockholders on March 13, 1913, the treasurer, Howes, reported upon the financial condition and results of the year's business. All the stockholders, five in number, were re-elected members of the board of directors, and all the old officers of the company were re-elected.

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At a meeting of the board of directors held on the same day, all the directors being present except L. K. Foster, it was voted to increase the fixed or "executive" salary of Hopkins, the vice-president, and of Foster, the assistant treasurer; and it was further voted that "'each of the three officers'" named in the vote of May 15, 1912, was "'to receive during the current year a share of the excess net earnings' (over and above the amount required to pay a dividend of 8% per annum on the capital stock) 'in proportion to the holdings of shares of stock in the company.'"

In June, 1913, L. K. Foster resigned as a member of the board of directors, and the single share of stock held by him, with the assent of the board of directors, was transferred to Emily F. Howes, the wife of Clarence G. Howes, who thereupon by election became a director of the company.

At the annual meeting on March 19, 1914, all the stockholders by election became members of the board of directors; and all the old officers were re-elected at that meeting, or at the meeting of the board of directors on the same day.

During the period between the organization of the company and November 14, 1914, "practically the entire management of the financial operations of the company . . . was in the hands of Howes, who supervised the work of bookkeeping and from time to time directed entries upon the books by the bookkeeper crediting to the various officers of the company all of the excess profits as additional salaries under the terms of the votes" of May 15, 1912, and of March 13, 1913. The entries so made were termed "profits" upon the books. In accordance with this practice the following sums were credited to the plaintiff's account on the books: $481.32, as of December 1, 1912; $421.09, as of March 1, 1913; $1,859.60, as of March 1, 1914; $1,582.80, as on or about November 14, 1914, at which time the total credit balance in favor of the plaintiff upon the books stood at $3,403.08.

The finding of the auditor, that "practically all of the stockholders knew how such division was being made throughout the entire period in question," is fully supported by the further finding that "directors' meetings were held thereafter [after the first directors' meeting held May 15, 1912,] monthly until October, 1914, at which the treasurer, with few exceptions, reported as to business transacted and the expenses and profits thereof;" as

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also, by the fact that "a majority of the directors and stockholders" knew that "both Hopkins and Foster on more than one occasion devoted excess profits credited to them upon the books to the purchase of additional stock from Howes," and by their votes formally ratified the several transfers of stock.

The by-laws authorized the board of directors to "fix all salaries, including their own." It is not necessary to decide whether the board acting in good faith under the by-law had authority to fix salaries in terms absolute, or in terms contingent upon the success of the business, or, as it in fact did, to fix a minimum and maximum salary for each officer. However that may be, under the circumstances here disclosed it is clear that the provision for an "additional salary" to be paid out of "net earnings in excess of the amount required to pay a dividend of 8% per annum on the capital stock of this company, to be divided" in certain named proportions between the officers of the company or according to their several holdings of stock, is not an illegal and unlawful appropriation of the funds of the company as the defendant contends, in that it amounts to a dividend of excess profits between stockholders of the same class, not according to the amount of stock each one owns.

The votes of the board of directors, consisting of all the stockholders, were unanimous in adopting the method by which the salaries should be determined. These votes in legal effect were authorized by the stockholders by the absence of any disaffirmance or dissent at any subsequent meeting of directors or stockholders when the reports of the treasurer as to the disposition of the excess profits were presented to that meeting for its consideration, criticism, approval or rejection. *Kelley* v. *Newburyport & Amesbury Horse Railroad*, 141 Mass. 496. *Warren* v. *Para Rubber Shoe Co.* 166 Mass. 97. *Beacon Trust Co.* v. *Souther*, 183 Mass. 413.

On October 1, 1914, the plaintiff gave notice of his intention to sever his connection with the company and, as required by the condition upon the certificates of stock, gave notice of his desire to dispose of his stock at the expiration of thirty days. There then stood to the credit of the plaintiff upon the books of the company $3,403.08, which he was entitled to receive as additional salary under the votes of the directors authorized by the by-laws or by the vote and the ratification of the stockholders. Under an

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arrangement with the treasurer, who purchased the stock, the plaintiff received eleven promissory notes of the company of the face value of $2,000, in full satisfaction and discharge of his entire demand against the company. These notes were executed by the treasurer, were entered upon the books by the bookkeeper under instructions by Howes, and Hopkins, the vice-president, was told on the same day, November 14, 1914, that the notes had been given in settlement of the plaintiff's account. The first four notes to fall due, aggregating $400, were paid in due course to the plaintiff. The auditor finds that "Prior to the payment of any one of the said notes a majority of the directors and of the stockholders of the company knew of their existence, and for what purpose they had been given, and it does not appear that any step was taken by official action or otherwise to repudiate the obligation or any question raised as to the validity of the notes until Exhibit 1 in this case was presented for payment and suit brought to recover thereon. There does not appear to have been at any time any vote expressly and in terms ratifying the giving of the notes." All the notes were given and received in payment of an existing debt due from the company to the plaintiff. Whether the treasurer had implied authority to execute the notes under the by-laws becomes immaterial in view of the finding of the auditor, which we think the evidence warrants, that "the act of signing and delivery of the notes was fully ratified by the directors and stockholders, and therefore by the company itself, and that the right of the company to avoid the contract thus made, if such right ever existed, has been waived, and the notes in suit are valid outstanding obligations of the defendant." *Sherman* v. *Fitch*, 98 Mass. 59, 64.

It follows that the request of the defendant for the rulings

"(1) Where the directors of a corporation pass a vote to the effect that three of their number shall receive as salary all the net profits of the corporation in excess of an amount sufficient to pay an eight per cent (8%) dividend on the stock in any year, and those of the directors who were to receive such additional salary vote in favor of the passage of such vote, and their votes were necessary for the passage of such vote, such vote is illegal and void and of no effect,"

and

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"(2) Where the treasurer of a corporation, without having specific authority given to him by the Articles of Organization, or by the By-laws, or by any vote of the directors or stockholders, makes notes of the corporation and delivers them to the payee, who was assistant treasurer and a director of the corporation from the time of its incorporation to a time just prior to the giving of the notes, and in addition such notes were given in payment of an alleged claim of the payee to his share of the profits of the corporation, and no vote of the directors had been passed, authorizing the payment of a dividend or division of profits, and a majority of the directors at the time the first note became due had been elected subsequent to the date of the giving of the notes, and the treasurer had informed them that the notes had been given, and the evidence does not show that such newly elected directors knew for just what purpose said notes had been given, whether in payment of unpaid salary or as a share of undivided profits, and no vote or other official action was taken by the directors of the corporation in any way ratifying the giving of said notes, then in such case said notes were given without authority, without consideration and were not ratified by the corporation, and the corporation will not be liable on said notes, especially where the plaintiff is the payee as above described, and not a holder in due course,"
was refused rightly.

Exceptions overruled.

HERBERT R. HOUGHTON *vs.* CHARLES KEVENEY & others.

Suffolk. February 4, 1918. — April 20, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

Wagering Contracts. Limitations, Statute of.

In a suit in equity under R. L. c. 99, §§ 4, 6, against a stockbroker and alleged equitable trustees, to recover money paid as margins on wagering contracts, the principal defendant is not liable unless he had reasonable cause to believe that the plaintiff intended that there should be no actual purchases or sales; but, by the terms of § 6, if the plaintiff did not own the securities at the time of giving the orders to sell and settlements were made without the completion

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of the purchase or sale of the securities ordered to be bought or sold, this is *prima facie* evidence that there was an intention that there should be no actual purchase or sale and that there was reasonable cause to believe that such intention existed within the meaning of § 4 of the statute.

In a suit in equity under R. L. c. 99, §§ 4, 6, against a stockbroker and alleged equitable trustees to recover money paid as margins on wagering contracts, where four series of transactions were alleged and the defendant set up the statute of limitations, it appeared that the first two series of transactions had been balanced and "squared up" and that the plaintiff had given to the defendants a receipt in full covering them, and that these transactions were closed more than six years before the filing of the bill, and it was *held* that the different series of transactions were distinct from each other and did not constitute an open running account, and that the right to recover for payments made in the first two series of transactions was barred by R. L. c. 202, § 2.

BILL IN EQUITY, filed in the Superior Court on January 19, 1917, against the members of a firm of stockbrokers as the principal defendants and certain other defendants holding funds sought to be reached and applied as equitable assets of the principal defendants, under R. L. c. 99, §§ 4, 6, to recover money and securities alleged to have been paid and delivered to the principal defendants as margins on wagering contracts.

The answer of the principal defendants set up, among other matters, that the cause of action mentioned in the plaintiff's bill did not accrue within six years before the filing of the bill.

The defendants at first claimed a trial by jury and afterwards the case was referred to an auditor, who filed a report in regard to which the agreement was made which is stated in the opinion. Thereafter the case came on to be heard by *Wait*, J., who at the request of the parties reported it for determination by this court upon the pleadings, the auditor's report and the agreement of the parties, such judgment to be entered as law and justice required.

H. T. Richardson, for the plaintiff.

A. E. Burr, (*F. L. Simpson* with him,) for the defendants.

DE COURCY, J. This suit, based on the provisions of R. L. c. 99, § 4, was brought to recover money paid on margins under alleged wagering contracts in stocks made by the plaintiff with the principal defendants, Keveney and Sawtelle. These are referred to herein as the defendants; and no question arises as to the other defendants, who are merely equitable trustees. After the coming in of the auditor's report both parties waived the claim for a trial by jury and all objections to the auditor's admission or exclusion of evidence; and the plaintiff waived the statutory provision making

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the auditor's report *prima facie* evidence, it being agreed that "the auditor's report should be treated as an agreed statement of all the facts material to the issue." The sole question before us is whether the plaintiff is entitled to recover on the facts so found and agreed to.

The defendants were partners doing business as stockbrokers in Boston. During the period beginning in January, 1908, and ending apparently in 1916, they acted as brokers for the plaintiff in transactions relative to the purchase and sale of stocks on margin; and from time to time he deposited with them certain stocks, bonds and money on account of such transactions. Among the findings of the auditor, (which, as above stated, are to be treated as agreed facts,) are the following: "In no case where he ordered sales of stock on margins did he own any shares to correspond with those which he ordered to be sold, and he was never asked by the defendants to furnish any of such shares to complete the transactions. The total number of shares of various stocks which he so ordered to be sold was four thousand four hundred and sixty. His other transactions on margins were orders to purchase various stocks totalling five thousand one hundred and eighty shares, none of which were ever delivered or offered to him by the defendants. . . . Whenever the plaintiff gave instructions to buy or sell shares of stock he intended that he should not actually receive or deliver any of the shares represented by his orders but intended to cover his orders by giving corresponding orders to sell or buy at such time as he considered most advantageous and to make such profit or loss as might result therefrom without having actually received or delivered any of the shares. . . . At all times when he gave the orders to purchase or sell stocks on margin, or made deposits of money or securities the plaintiff had no intention as to whether the defendants should or should not make actual purchases or sales in carrying out his orders; that he did not care what methods were pursued by them in carrying out the transactions; that he had no intention of receiving from or delivering to the defendants the securities which he ordered them to buy or sell for him on margin but intended that they should carry out his orders in any manner they saw fit until such time as he determined to close a transaction and make a profit or loss therefrom without his having received or delivered any of the shares. . . . At the times of the

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various margin transactions with the plaintiff, the defendants had reasonable cause to believe that the plaintiff had no intention that he should receive or deliver any of the shares for which he gave orders for the purchase or sale."

During the hearings, the counsel for the defendants stated that in view of the recent decision of this court in the case of *Adams* v. *Dick*, 226 Mass. 46, "the defendants could not show any actual purchase or sale of stock (as therein defined) for which the plaintiff gave orders for them to buy or sell or that they had made any valid contracts therefor."

The provisions of § 4 of the statute applicable to the case are: "Whoever . . . upon margin . . . employs another to buy or sell for his account, any securities . . . , intending at the time that there shall be no actual purchase or sale, may sue for and recover in an action of contract . . . from the person so employed, any payment made, or the value of anything delivered, on account thereof, if such . . . person so employed had reasonable cause to believe that said intention existed; but no person shall have a right of action under the provisions of this section if, for his account, . . . the person so employed makes, in accordance with the terms of the . . . employment, personally or by agent, an actual purchase or sale of said securities . . . , or a valid contract therefor." The defendants rest their case upon the contention that in order to entitle the plaintiff to recover he must prove that he intended, at the time of the various transactions, that the defendants should not make actual purchases or sales in carrying out his orders. It seems plain from the language quoted that the intention "that there shall be no actual purchase or sale" referred to by the statute is the intention of the plaintiff, not that of his agent. The brokers are not made liable unless they had reasonable cause to believe that the plaintiff intended there should be no actual purchase or sale; nor even then if they make such actual purchase or sale, or a valid contract therefor. *Chandler* v. *Prince*, 214 Mass. 180, 182. But by the express terms of § 6, the fact that the plaintiff did not own the securities at the time of the giving of the order to sell, and the fact that settlements were made without the completion of the purchase or sale of the securities ordered to be bought or sold, are each made *prima facie* evidence "that within the meaning of § 4 there was an intention that

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there should be no actual purchase or sale," and also "that there was reasonable cause to believe that said intention existed." We understand these provisions to be applicable to all the transactions in issue in this case, and they supply the positive intention that there should be no actual purchases or sales by the defendants on the plaintiff's orders. As was said in *Adams* v. *Dick*, 226 Mass. 46, 53, "The plaintiff made out a *prima facie* case by showing short sales of stock. The burden then rested on the defendants to prove actual purchases and sales or valid contracts therefor in defence, in order to escape from the liability established by the statute." And see *Marks* v. *Metropolitan Stock Exchange*, 181 Mass. 251, 255. On the admitted facts, especially in view of said provisions of § 6, the plaintiff has proven all the elements necessary to a recovery under the statute.

The first two series of transactions, however, are barred by the statute of limitations. The account which opened January 11, 1908, was balanced or "squared up" September 25, 1908. The transactions begun in September or October, 1909, were ended in January, 1910, when the plaintiff gave the defendants a receipt in full. The finding is that each of these series of transactions was considered by both parties to be closed at the times when active transactions under them ceased. They were distinct from each other and did not constitute an open running account. The right of action created by the statute is one of contract, and plainly the six year limitation of R. L. c. 202, § 2, is applicable.

The findings of the auditor are correct, — that the plaintiff is entitled to recover under the third and fourth series of transactions. In accordance with the report judgment is to be entered in his favor for the sum of $8,019.24; and it is

So ordered.

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WILLIAM KNUDSON *vs.* GENERAL MOTORCYCLE SALES COMPANY, INCORPORATED.

BURTON RAYMOND *vs.* SAME.

Suffolk. November 14, 1917. — April 22, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Infant. Estoppel. Deceit. Municipal Court of the City of Boston, Appellate Division.

An infant is not estopped to deny a recital "that he is at least twenty-one years of age" contained in a contract in writing signed by him that he seeks to avoid.

An infant is not liable in tort for deceit by reason of having made false representations that he was of age.

An infant who avoids a purchase made by him under a contract of conditional sale and returns the article purchased is not liable in damages for deterioration of the article while in his possession under the contract.

An order of the Appellate Division of the Municipal Court of the City of Boston dismissing a report must be taken to be a denial of a motion previously made to recommit the report to the trial judge for amendment or amplification.

An order of the Appellate Division of the Municipal Court of the City of Boston denying a motion to recommit a report to the trial judge for amendment or amplification is not subject to revision.

TWO ACTIONS OF CONTRACT against the same defendant, each brought by a minor by his next friend to recover money paid by the plaintiff toward the purchase of a motorcycle under a contract of conditional sale avoided and repudiated by the plaintiff, who had delivered back the motorcycle to the defendant and demanded the money paid by him. Writs in the Municipal Court of the City of Boston dated respectively August 11 and August 25, 1916.

In the Knudson case the defendant's answer contained a claim in recoupment for use and misuse of the motorcycle by the plaintiff.

In the Municipal Court the cases were tried before different judges. In the Knudson case the judge found that the plaintiff was a minor, that when he made the contract he said that he was of age, that the contract was not beneficial to him and that the motorcycle was not a necessity for him. The judge ruled that the contract was one of conditional sale, and refused to give the rulings requested by the defendant. He found for the plaintiff in the sum

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of $121.70, and at the request of the defendant reported the case to the Appellate Division. The defendant filed in the Appellate Division a motion to recommit the report to the trial judge for amendment by adding to it a statement of certain things not contained in it. The Appellate Division made an order that the report be dismissed, and the defendant appealed.

The judge before whom the Raymond case was tried found that the plaintiff was a minor at the time that the contract of conditional sale was executed and that the motorcycle was not a necessity. He found for the plaintiff in the sum of $78, and at the request of the defendant reported the case to the Appellate Division. The Appellate Division made an order that the report be dismissed, and the defendant appealed.

A. W. Blakemore, for the defendant.

H. D. Linscott, for the plaintiff Knudson, submitted a brief.

R. T. Healey, for the plaintiff Raymond.

BRALEY, J. By their failure in performance, no title to the motorcycles passed to the plaintiffs, and ordinarily all payments made on account of the purchase price would be forfeited. *Chase* v. *Ingalls*, 122 Mass. 381. *Bailey* v. *Hervey*, 135 Mass. 172. *Smith* v. *Aldrich*, 180 Mass. 367. But, as they were minors during the time covered by the contracts, each plaintiff seeks in the present actions to recover back the moneys paid.

The finding of the trial judge that the motorcycles were not necessaries is not assailed, and, notwithstanding the recital in each of the instruments, "that he is at least twenty-one years of age," the plaintiffs even if the statements were false are not estopped from disaffirmance. *Merriam* v. *Cunningham*, 11 Cush. 40. *White* v. *New Bedford Cotton Waste Corp.* 178 Mass. 20. *Sims* v. *Everhardt*, 102 U.S. 300. The contracts, therefore, even if treated as executed, can be avoided, and, if material, the motorcycles being in possession of the defendant, there is no consideration to be returned. *Benson* v. *Tucker*, 212 Mass. 60, 62.

It is true that recoupment is pleaded. The plaintiffs, however, are not liable in tort for deceit arising from false representations as to their age, or for damages to the machines while in their possession and used by them under the contract. *Slayton* v. *Barry*, 175 Mass. 513. *Drude* v. *Curtis*, 183 Mass. 317.

The defendant cites *Walker* v. *Davis*, 1 Gray, 506, where it was

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remarked that infancy is not a defence to a civil action for fraud. But *Walker* v. *Davis*, as pointed out by Lathrop, J., in *Brooks* v. *Sawyer*, 191 Mass. 151, 153, is disposed of by *Drude* v. *Curtis*, 183 Mass. 317.

It was said by Morton, J., in *Gillis* v. *Goodwin*, 180 Mass. 140, where the plaintiff, a minor, sued to recover certain sums paid under a contract for the conditional sale and purchase of a bicycle, "Whatever may be the law elsewhere . . . it is settled in this State that a minor can avoid a contract like that in this case, and is not obliged to put the other party *in statu quo* or allow anything for the rent and use of the property while in his possession. *Morse* v. *Ely*, 154 Mass. 458. *Pyne* v. *Wood*, 145 Mass. 558. *McCarthy* v. *Henderson*, 138 Mass. 310. *Dube* v. *Beaudry*, 150 Mass. 448. *Walsh* v. *Young*, 110 Mass. 396. *Chandler* v. *Simmons*, 97 Mass. 508, 514." We find nothing in the elaborate argument of the learned counsel for the defendant by which in principle the cases at bar can be distinguished.

It follows that the requests for rulings were denied properly, and, whether in the Knudson case the defendant's motion to recommit the report of the trial judge for amendment or amplification should have been allowed, was discretionary with the Appellate Division, whose general order dismissing the report is to be treated as a denial of the motion. The entry in each case must be

Order dismissing report affirmed.

STEVEN PILOK & others *vs.* JOHN BEDNARSKI.

Franklin. February 25, 1918. — April 22, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Mortgage, Of real estate. *Equity Jurisdiction*, To compel accounting for surplus after foreclosure sale.

The holder of a third mortgage on real estate may maintain a suit in equity against the holder of a second mortgage on the same property, who has foreclosed his mortgage and has become the purchaser of the property at the foreclosure sale, but who has refused to complete the foreclosure by making a deed to himself under a power contained in the second mortgage, to compel the defendant to pay to the plaintiff the surplus of the purchase money after the satisfaction of

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the debt to the defendant secured by the second mortgage, because equity will treat as done that which ought to have been done, and the defendant will not be allowed to take advantage of his own failure to perform his duty toward the plaintiff by completing the foreclosure of his second mortgage.

BILL IN EQUITY, inserted in a common law Superior Court writ dated January 28, 1916, by the holders of a third mortgage on certain real estate in Deerfield, against the second mortgagee of the property, who had foreclosed his second mortgage and had become the purchaser at the foreclosure sale thereunder, to compel the defendant to pay over to the plaintiffs any surplus found to be due to the plaintiffs after payment to the defendant of the debt secured by his second mortgage.

The case was referred to a master, who filed a report in favor of the plaintiffs. Later the case was heard by *Hamilton*, J., who made an interlocutory decree that the master's report be confirmed. On a motion for a final decree, by agreement and at the request of the parties the judge found that the findings of the master were true and reserved and reported the case upon the pleadings and the master's report for determination by this court, such decree to be entered as the merits of the case required.

The case was submitted on briefs.

W. A. Davenport & C. Fairhurst, for the plaintiffs.

P. D. Martin, for the defendant.

BRALEY, J. The plaintiffs are entitled to a decree under the first prayer of the bill, the terms of which are to be settled in the trial court.

The defendant, as the second mortgagee, having been authorized by the power to bid at the foreclosure sale, and his bid, which was the highest, having been accepted, the deposit made and the memorandum or certificate of sale signed by the auctioneer, became the purchaser, and nothing remained by way of performance except to execute the deed to himself, and, upon deducting the expenses, to apply the purchase price in liquidation of the mortgage debt, retaining the balance, if any, for the benefit of those who should receive it. *Hall* v. *Bliss*, 118 Mass. 554. But it appears from the answer "that he does not intend to do so" and the report states that at the hearing before the master he testified that he did not intend to take title and in so far as possible has disaffirmed the sale.

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The power has been fully executed. The mortgage has been regularly foreclosed. The plaintiffs, however, rank as the third mortgagee. By the terms of the advertisement, and of sale, the property was sold subject to an outstanding first mortgage and unpaid taxes. And, the amount received having been more than sufficient to satisfy the second mortgage and costs of foreclosure, the surplus became payable to the plaintiffs, who, as the junior incumbrancers, succeeded to the rights of the mortgagor. *Wiggin* v. *Heywood*, 118 Mass. 514, 516. *Mattel* v. *Conant*, 156 Mass. 418. *Bon* v. *Graves*, 216 Mass. 440.

But notwithstanding these well settled principles, the defendant contends that, as he cannot sue himself for specific performance, the plaintiffs are remediless. It is true that execution of the deed was requisite for vesting the title, and he could not bring suit. A mortgagee nevertheless when acting under the power is a trustee, who in every particular must execute the trust with strict fidelity to the mortgagor or whoever may have his estate in the premises. As the defendant by force of the power lawfully became the purchaser, he was bound to complete the purchase as fully and as effectually as if some other person had bought. The fact that he acted in the dual capacity of seller and purchaser conferred no additional rights, but imposed a stricter accountability when he bought for himself. The plaintiffs' rights under the circumstances cannot be destroyed by the refusal of performance. A court of equity will treat that which ought to be done as having been done. The defendant, therefore, under all the authorities is to be treated as the purchaser at a valid sale, and, as between the plaintiffs and himself, it is of no consequence that as yet no deed has been passed. *Hood* v. *Adams*, 124 Mass. 481, 483, 484. *Muhlig* v. *Fiske*, 131 Mass. 110, 114.

The present case is clearly distinguishable from *Fall River Savings Bank* v. *Sullivan*, 131 Mass. 537, where it was held that if a purchaser at the foreclosure sale is unable upon tender of the deed to comply with the terms of the sale because financially worthless, the mortgagee may again exercise the power.

Ordered accordingly.

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MATHILDA FRIEDRICH *vs.* WILLIAM FRIEDRICH.

Suffolk. March 4, 1918. — May 1, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Marriage and Divorce, Cross libel. *Jurisdiction.*

Although in R. L. c. 152, §§ 1–5, defining the jurisdiction of our courts in divorce cases there is no reference to cross libels, the right of a libellee to file a cross libel has been recognized and the practice long has prevailed in this Commonwealth.

Although libels for divorce are not suits in equity but belong on the law side of the court and the Superior Court sitting to hear them has not general equity powers, yet by R. L. c. 152, § 29, that court "may, if the course of proceeding is not specially prescribed, hear and determine all matters coming within the purview of this chapter [relating to divorce] according to the course of proceeding . . . in courts of equity."

If a husband, who has lived in this Commonwealth for five years, brings a libel for divorce for cruel and abusive treatment against his wife, who has her domicil in another State so that she could not bring an original libel for divorce against her husband in this Commonwealth, and the wife appears and files a cross libel against her husband on the ground of desertion and he enters an appearance by counsel, if the husband afterwards fails to prosecute his libel and it is dismissed for want of prosecution, this does not take away the jurisdiction of the court over the libel of the wife, which, once having been acquired over the proceeding as a cross bill, will be retained, in the absence of collusion, for the purpose of doing justice between the parties.

CROSS BILL for divorce on the ground of desertion, originally filed in answer to a libel filed by the present libellee, which afterwards was dismissed for want of prosecution, as stated in the opinion.

In the Superior Court the case was heard by *Jenney,* J., who found the facts which are stated in the opinion and ruled, subject to the exception of the libellant, that she was not entitled to maintain her libel. He made an order dismissing the libel and reported the case for determination by this court, such order or decree to be entered as might be deemed proper.

J. M. Hendricken, for the libellant.

M. W. Cohen, for the libellee, submitted the case without argument or brief.

DE COURCY, J. The parties were married in the State of New York in 1906. They were residents of that State before their

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marriage, and as husband and wife continued to live there until December 3, 1910. At that time the husband deserted the wife and came to this Commonwealth; and since then he has continued to reside in Boston, while the wife remained in New York. Under the general rule established by our statutes (except where the libellant has lived in the Commonwealth for five years last preceding the filing of the libel, or three years in case the parties were inhabitants of this Commonwealth at the time of their marriage), in order to give our courts jurisdiction to grant a divorce the parties must have "lived together as husband and wife in this Commonwealth." In other words, they must have had a domicil here. *Shaw* v. *Shaw*, 98 Mass. 158. *Winans* v. *Winans*, 205 Mass. 388. And see *Schrow* v. *Schrow*, 103 Mass. 574. The contention that the domicil of Mrs. Friedrich followed that of her husband is negatived by the trial judge, who apparently concluded that she elected to retain her domicil of marriage. *Burlen* v. *Shannon*, 115 Mass. 438, 447. *Burtis* v. *Burtis*, 161 Mass. 508. It follows that the non-resident wife could not have maintained an original libel for divorce in our courts. R. L. c. 152, § 4. *Ross* v. *Ross*, 103 Mass. 575. *Weston* v. *Weston*, 143 Mass. 274. *Clark* v. *Clark*, 191 Mass. 128.

On December 21, 1916, William Friedrich brought a libel for divorce against his wife Mathilda for cruel and abusive treatment, returnable in the Superior Court for our county of Suffolk. Due service was made on the libellee, and she appeared by counsel and filed an answer. Undoubtedly the court had jurisdiction to decree a divorce in his case, as he had lived in this Commonwealth for five years. R. L. c. 152, § 5. Later she filed this cross libel for the desertion which had occurred in New York, and he entered an appearance by counsel. Both libels were set down for hearing. The husband failed to prosecute his libel and it was dismissed for want of prosecution. The cross libel of the wife was heard as an uncontested case, the husband not appearing in opposition. The judge ruled, in substance, that the court had no jurisdiction to grant her a divorce; and the correctness of that ruling is before us for determination.

There is no reference to cross libels in the statute defining the jurisdiction of our courts in divorce cases. R. L. c. 152, §§ 1–5. It is generally recognized, however, that the libellee has a right

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to file a cross libel, even in the absence of any express statutory provision; and the practice of doing so has long prevailed in this Commonwealth. See *Watkins* v. *Watkins*, 135 Mass. 83. Superior Court Divorce Rules 2, 7. Libels for divorce are not suits in equity, but belong on the law side of the court; and the Superior Court, sitting to hear them, has not general equity powers. *Greenia* v. *Greenia*, 206 Mass. 449. *Adams* v. *Holt*, 214 Mass. 77. But it is provided by R. L. c. 152, § 29, that "The Superior Court may, if the course of proceeding is not specially prescribed, hear and determine all matters coming within the purview of this chapter according to the course of proceeding in ecclesiastical courts or in courts of equity."

We do not find it necessary to determine what was the practice of the ecclesiastical courts with reference to cross suits when the original statute was enacted in 1835 (Rev. Sts. c. 76, § 38), or between that time and 1857, when all civil jurisdiction over the subject of marriage and its incidents was taken away from the ecclesiastical tribunals by St. 20 & 21 Vict. c. 85. See Phil. Eccl. Law, (2d ed.) 642; Browne, Divorce Court Pract. (2d ed.) 185, 186. For the present practice, see Rayden on Divorce, 122, 123; 16 Halsbury's Laws of England, 515.

According to the procedure in courts of equity, however, (which is made applicable to divorce cases by R. L. c. 152, § 29,) when the respondent appears and files a cross bill, and the court thereby acquires jurisdiction of the parties and the subject matter of the suit, it will retain and exercise that jurisdiction until proper relief is given to the parties. And it is generally held that a divorce may be granted to a non-resident on his or her cross libel, even though a statute in general terms requires the libellant to have been a resident of the State for a designated time. *Jenness* v. *Jenness*, 24 Ind. 355. *Barret* v. *Barret*, 11 Ky. L. R. 287. *Clutton* v. *Clutton*, 108 Mich. 267. *Pine* v. *Pine*, 72 Neb. 463. *State* v. *Moran*, 37 Nev. 404, 410. *Von Bernuth* v. *Von Bernuth*, 6 Buch. 487. *Newman* v. *Newman*, 27 Okla. 381. *Charlton* v. *Charlton*, 141 S. W. Rep. 290. *Fisk* v. *Fisk*, 24 Utah, 333. *Ferry* v. *Ferry*, 9 Wash. 239. See *Shatney* v. *Shatney*, 76 N. H. 391. See also 59 L. R. A. 149, note; 9 Ann. Cas. 1200, note. In *Valk* v. *Valk*, 18 R. I. 639, where a different result was reached, no cross petition for divorce was filed by the non-resident respondent; and

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it was held that under the local statute the court was without jurisdiction to grant her affirmative relief upon her answer. Nor will the failure of the original libellant to prosecute his libel oust the court of its jurisdiction of a cross libel, which sets up additional facts not alleged in the original libel relating to the subject matter, and prays for affirmative relief in the case thus made. Fletcher, Eq. Pl. & Pr. § 918. *Watkins* v. *Watkins*, 135 Mass. 83. *Abele* v. *Abele*, 17 Dick. 644. *Dewees* v. *Dewees*, 55 Miss. 315. *Schira* v. *Schira*, L. R. 1 P. & D. 466.

As we construe the report, the cross libel was dismissed on the ground that the court did not have jurisdiction to decree a divorce to the non-resident wife. In our opinion the court did have such jurisdiction on the facts here disclosed. If it should appear that the initial filing of the libel by the husband, or his withdrawal of it, or any other part of the proceedings was collusive, the cross libel should be dismissed. But it would be an injustice, after the wife has obeyed the summons of the court and submitted to its jurisdiction, to deny her a hearing merely because her husband declined to prosecute his charges against her after learning that she had come prepared to answer them.

Accordingly the case is to be remanded to the Superior Court for a hearing on the merits.

So ordered.

HENRY C. HALL, administrator, *vs.* WILLIAM A. PAINE & others.

Suffolk. January 8, 1918. — February 28, 1918.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Stockbroker, Liability to customer. *Agency*, Ratification or repudiation of act of agent. *Election*. *Letter*. *Sale*, Rescission.

One, who had dealt with a stockbroker in transactions carried on upon margins, brought an action against the stockbroker alleging a breach of an agreement to carry certain stock upon margin for him as long as he wished and to deliver to him on demand the same number of shares upon payment of what he might then owe. The action was tried before an auditor, and during the course of the hearings the plaintiff learned for the first time that sales of the stock in question were made by the defendant to himself. *Held*, that such sales were a breach of the duty owed by the defendant to the plaintiff and were voidable by the plaintiff.

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In order to avoid such sales, it was necessary for the plaintiff to repudiate them after he discovered their voidable character.

If the plaintiff did not repudiate such sales upon learning of their voidable character, he must be taken to have ratified them.

It appeared that, between three and four months before the bringing of the action above described, the plaintiff had written to the defendant a letter demanding a delivery to him of the shares of stock in question "according to agreements previously made with me by" you. At that time the plaintiff did not know that the defendant had taken over any of the shares. The auditor's report was filed five years after the action was begun. After the plaintiff discovered at the trial before the auditor the fact of the voidable sale by the broker to himself, he did not repudiate that sale, but continued to press the action upon the ground upon which he had begun it. *Held*, that neither the letter written by the plaintiff to the defendant three or four months before the bringing of the action nor the bringing of the action could be regarded as a repudiation of the sale; and that, by his conduct after he learned of the voidable character of the sale, the plaintiff must be taken to have ratified that sale.

CONTRACT, with a declaration, as amended after the decision of the case reported in 224 Mass. 62, in three counts, which are described in the opinion. Writ dated November 12, 1907.

The case was referred to an auditor, who filed a report on November 6, 1912, and a supplemental report on April 21, 1913.

The previous trial in the Superior Court is described in the opinion. After the decision of this court, reported in 224 Mass. 62, there was a second trial before *Fessenden*, J., upon the declaration as amended. The evidence at and the course of this trial are described in the opinion. The presiding judge, after the answers of the jury to the special questions described in the opinion, ordered a verdict for the defendants and reported the case to this court for determination, it being agreed that, if the ruling ordering a verdict for the defendants was right, judgment should be entered for the defendants, but, if this court should be of the opinion that that ruling was wrong, judgment should be entered for the plaintiff in such sum as this court might order.

S. L. Whipple & A. Lincoln, for the plaintiff.

R. M. Morse, (*W. P. Everts* with him,) for the defendants.

DE COURCY, J. The defendants, a firm of stockbrokers, carried certain stocks on margin for the plaintiff's intestate (herein referred to as the plaintiff), for some months previous to February 24, 1904. On that date a final account was rendered by the defendants to their said customer, and a check for the balance shown due was

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sent to and accepted by him. This action was brought November 12, 1907.

The original declaration and the substituted one were framed on an alleged promise by the defendants to carry the Copper Range Consolidated Mining Company stock for the plaintiff as long as he desired, regardless of the state of his margin account, and to deliver the same number of shares to him on demand and on payment of what he then might owe them. While the hearings before the auditor were in progress, and again after his report was filed, the plaintiff added other amendments alleging that certain securities held by the defendants as collateral for his account, at various times, were reported to him as sold; that the reported sales were fictitious, that the defendants still held the securities as his agents, and that he had made demand for their delivery. After a trial in the Superior Court the case came before this court on a report. *Hall* v. *Paine,* 224 Mass. 62.

The decision then rendered disposed of the plaintiff's claims based on the alleged special agreement to carry shares of Copper Range Consolidated Mining Company stock, and those based on the sales of stock by the defendants as brokers for the plaintiff to themselves as brokers for other customers. At the last trial in the Superior Court the jury specially found that certain shares of Copper Range were not actually sold by the defendants, on the stock exchange or elsewhere, on December 15, 1902, on August 14, 15 and October 14, 1903, and on February 23, 1904. To the question "Did the plaintiff rescind, avoid or repudiate the sales, if so when?" they answered, "Yes, December 14, 1905." This answer was not warranted by the evidence, and was set aside by the presiding judge; and a verdict was directed for the defendants.

As was pointed out in the earlier decision, under the long recognized rule in this Commonwealth the title to the stocks now in controversy, which the defendants bought for the plaintiff to be carried on a margin, was in the defendants, as between the parties. The plaintiff was entitled to receive them only upon paying or offering to pay for them. In the first count of the declaration as finally amended it is expressly alleged that by February 24, 1904, the defendants had reported the entire amount of said securities to have been sold. On this record it must be assumed that they were not sold on the exchange, but were taken over by

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the defendants, for their own account. This was a breach of the duty they owed the plaintiff; and the rule of damages is the same whether this taking over of stocks already in their name be treated as a sale or as a conversion. Such attempted sales to themselves, even though made at the market value of the stocks, were voidable by the plaintiff, at his election. He was regularly notified of each sale as made. At the time of the hearings before the auditor, at the latest, he knew that these sales in controversy were made by the defendant brokers to themselves. Unless he saw fit to repudiate them after he discovered their voidable character, he must be held to have ratified them. It was with reference to these transactions that the court said in the earlier opinion: "So far as the defendants bought stocks for themselves which as brokers they were selling for the plaintiff, these sales were at least voidable and may be treated as such by the plaintiff." And it was said further: "The plaintiff was at liberty to set aside such sales within a reasonable time after he knew of them and demand the return of the stocks. The trial seems to have proceeded without objection, under amendments to the declaration, upon the theory that he had elected to set aside these sales and demand the return of the stocks. The correct rule of damages to be applied, if the plaintiff should prove that the defendants made sales of stock to themselves, either real or fictitious, is that the plaintiff may recover the difference between the value of the stocks when sold and their value when the sales were made known to and repudiated by him, together with interest from that date." *Hall* v. *Paine*, 224 Mass. 62, 74, 77. *Todd* v. *Bishop*, 136 Mass. 386. *Rice* v. *Winslow*, 180 Mass. 500, 503.

The final account between the parties had been closed February 24, 1904, and a balance of $784.72 was then paid to the plaintiff in settlement. The only demand made by the plaintiff before bringing this action was in his letter of July 29, 1907. This letter requested the defendants to deliver to him fourteen hundred and fifteen shares of stock of the Copper Range Consolidated Mining Company, "according to agreements previously made with me by your firm." It is clear from the record that the "agreements" referred to were the alleged oral promises to carry shares of said Copper Range stock for the plaintiff as long as he wished them to, regardless of the state of his margin account and of the market. It was

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this alleged agreement on which he based his original declaration, and to which he testified before the auditor and in the Superior Court. The breach on which he relied was not the taking over of some of the stocks at the market price by the defendants while acting as his agents, but the sale of any of them, on the exchange or elsewhere, without his consent or order. In fact at the time said demand was made he did not know that the defendants had taken over any of these stocks. And when, at the hearings before the auditor many months afterwards, the opportunity was afforded him of discovering the facts, and even after the auditor found that the alleged agreement was not proved, the plaintiff still persisted in his original claim; he gave no notice that he repudiated or rescinded the sales to the defendants, and made no demand for the stocks acquired by them.

The demand made in July, 1907, in support of the specific alleged agreement cannot be used in this proceeding to support a cause of action of whose existence the plaintiff was ignorant until some three years after the writ was brought. *Todd* v. *Bishop*, 136 Mass. 386, 392. *Learned* v. *Foster*, 117 Mass. 365. *McKinley* v. *Warren*, 218 Mass. 310. Nor can the bringing of the action be regarded as an avoidance of the sales made to the defendants. The plaintiff now bases his claim on the assumption that the defendants had a right to sell the stock, in consequence of the plaintiff's failure to furnish on request a reasonable amount of margin to protect his account. The sales made to themselves as brokers for other customers were valid. Those made to the defendants for their own account might have been rescinded or repudiated by the plaintiff on learning the facts, apparently in 1910. He took no steps to avoid them and to demand the stock, as he might have done. This action was brought three years before, for a different cause, and when the plaintiff was not aware that the sales now relied upon had been made and had not attempted to repudiate them. For that reason the presiding judge rightly directed a verdict for the defendants. See *Bassett* v. *Brown*, 105 Mass. 551; *Hall* v. *Paine*, 224 Mass. 62, 76, 77.

This conclusion renders it unnecessary to consider the other exceptions taken by the defendants. In accordance with the report the entry must be

Judgment for the defendants.

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STONE, TIMLOW AND COMPANY, INCORPORATED, *vs.* JACOB STRYKER & another.

Middlesex. February 5, 1918. — March 1, 1918.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Equity Jurisdiction, To reach and apply equitable assets. *Corporation*, Equitable attachment of shares.

In a suit in equity to reach and apply equitable assets in payment of an alleged debt to the plaintiff, under R. L. c. 159, § 3, cl. 7, as amended by St. 1902, c. 544, § 23, and St. 1910, c. 531, § 2, a breach of an executory contract of service by the principal defendant, the claim of damages for which has not been reduced to a judgment, is not a debt on which the suit can be founded, and a demurrer to the bill must be sustained.

Under St. 1910, c. 531, § 2, which gives jurisdiction in equity "to reach and apply shares or interests in corporations organized under the laws of this Commonwealth or of the United States, and located or having a general office in this Commonwealth, whether the plaintiff is a creditor or not, and whether the suit is founded upon a debt or not," a suit cannot be maintained to reach and apply a certificate of shares in a certain corporation in the possession of the principal defendant but standing in the name of another person, whose name is indorsed upon the back of the certificate, if the certificate contains a provision making it subject to a by-law by which shares in the corporation can be transferred only by offering them first to the directors of the corporation, who have the right to buy them at their book value, because the principal defendant has no ownership nor present interest in the shares represented by such a certificate.

BILL IN EQUITY, filed in its amended form in the Superior Court on July 30, 1917, under R. L. c. 159, § 3, cl. 7, as amended by St. 1902, c. 544, § 23, and St. 1910, c. 531, § 2, by a corporation, alleging that by a contract dated March 9, 1911, the defendant Stryker agreed to render certain services to the plaintiff as superintendent and to do certain things and refrain from doing certain other things, that the defendant Stryker abandoned the contract and left the plaintiff's employ and "that the damage resulting to it from said breach of contract by the defendant Stryker exceeds in amount the verdict and judgment hereinafter referred to and the value of the five shares of stock sought to be reached hereby."

The bill further alleged that the defendant Stryker brought actions of libel against the plaintiff and the defendant Stone

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based upon articles published in certain newspapers, and at the trial of these actions one issue between the parties was the question whether the contract had been broken by the defendant Stryker or had been abandoned by mutual consent of the parties hereto, that this issue was tried fully and was presented to the jury by special questions, to which the jury answered that the contract was broken by the defendant Stryker. Upon a motion for a new trial the general verdicts which had been entered upon the questions answered by the jury were set aside as to damages only, and a new trial was had which resulted in a verdict for the defendant Stryker in the sum of $1,250, [see 227 Mass. 253,] and judgments thereon were rendered in favor of the defendant Stryker as against the plaintiff and the defendant Stone for the amounts of the verdicts and costs; that thereby all questions as to the breaches of the contract by Stryker became *res judicata* by the judgments and the proceedings incidental thereto; that the defendant Stryker is financially irresponsible and, except five shares of the capital stock of the plaintiff afterwards mentioned, has no assets out of which any judgment in damages for such breach of contract can be satisfied; that he has the option to enforce said judgments against either the plaintiff or the defendant Stone and threatens to take out execution and levy against the goods and estate of the defendant Stone; that if the defendant Stryker enforces said judgments against the plaintiff, the plaintiff will be unable to set off the amount of said judgments against the amount which the defendant Stryker owes this plaintiff for breaches of the contract but will be obliged to pay the amount of the judgments and then will be unable to collect its claim for breach of contract against the defendant Stryker; and that if the defendant Stryker enforces his said judgments against the defendant Stone, the plaintiff will be unable to enforce its claim for breach of contract against the defendant Stryker.

The bill further alleged that, as between the plaintiff and the defendant Stone, the latter personally published the libels which constituted the cause of the actions of tort, the plaintiff being liable because Stone purported to act in said publications as an officer and agent of the plaintiff but in so acting did so without right and without authority and that the defendant Stone should in justice and equity personally pay the amount of said judgments;

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that the plaintiff therefore is entitled to the benefit of a right of subrogation as to the judgment of the defendant Stryker against the defendant Stone toward satisfaction *pro tanto* of the claim of the plaintiff against the defendant Stryker.

The bill further alleged that the defendant Stryker claims to be the owner of five shares of the capital stock of the plaintiff by virtue of a certificate standing in the name of Nathan S. Brinton and bearing on the back thereof an indorsement purporting to constitute a transfer of said stock from said Brinton to said Stryker; that said certificate is in the possession of the defendant Stryker, it having been delivered to him by the defendant Stone, the then owner thereof; that the defendant Stryker has demanded of the defendant Stone, as treasurer of the plaintiff, that upon the surrender of said certificate a new certificate for five shares be issued to and in the name of said Stryker; that the by-laws of the plaintiff contain the following provision:

"Appraisal and sale of shares of stock. If a stockholder of this corporation desires to dispose of any of his shares, or if the executor or administrator of a deceased stockholder, or the grantee or assignee of any shares sold on execution, desires to dispose of his shares, he shall first give the Directors of the Corporation the option to buy said shares for the use of the Corporation, at their book value, which book value it shall be the duty of the Directors to give upon request. And if said Directors shall choose to take such shares for the use of the corporation, such stockholder, executor, administrator, grantee or assignee shall, upon the payment or tender to them of such book value thereof, and the dividends due thereon, transfer and assign such share or shares to said Corporation, provided, however, the said Directors shall not be obliged to take such shares at the book value aforesaid unless they think it for the interest of the Corporation, and if they shall not within ninety days after said shares are offered to them, take the shares and pay such stockholder, executor, administrator, grantee or assignee the book value thereof, such stockholder, executor, administrator, grantee or assignee shall be at liberty to dispose of the same shares to any person whatsoever."

That the defendant Stryker has brought a bill in equity against the plaintiff, the defendant Stone and others as officers of the corporation praying that the defendant Stone be ordered to offer to

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the directors of the plaintiff the certificate of stock, giving them the option to buy it for the use of the plaintiff at the book value of the shares which it represents; that, if the directors within ninety days shall not vote to take such shares for the use of the corporation, the defendant Stone be ordered to transfer the shares on the books of the corporation to the defendant Stryker and issue a new certificate to him; that if within ninety days the directors shall vote to take such shares of stock for the use of the plaintiff the book value of such shares shall be ascertained by the Supreme Judicial Court and the plaintiff ordered to pay such amount to the defendant Stryker; that the pleadings upon this bill in equity have been completed and the suit has been referred to a master and hearings thereon have been had; that the master has submitted to counsel a draft report containing findings in favor of the claims of the defendant Stryker, but has not yet filed his report thereon and that the bill is now pending in the Supreme Judicial Court; that the value of said shares exceeds $1,000.

The bill also alleged that the defendant Stryker has also brought an action in the Superior Court against this plaintiff for breach of the contract, which action is now pending and is awaiting trial.

The prayers of the bill were as follows:

1. That the defendant Stryker might be restrained from collecting any sums on account of the judgments in his actions of tort for libel against the plaintiff and the defendant Stone pending the determination of this suit.

2. That the amount due the plaintiff from the defendant Stryker for breaches of the contract by the defendant Stryker be ascertained and determined.

3. That the judgments in the actions of tort for libel brought by the defendant Stryker against the plaintiff and the defendant Stone may be set off and applied *pro tanto* on account of the damages due from the defendant Stryker to the plaintiff.

4. That the defendant Stone be ordered to pay to the plaintiff the amount of the judgment secured by the defendant Stryker against the defendant Stone in satisfaction *pro tanto* of the claim of the plaintiff against the defendant Stryker.

5. That the interests of the defendant Stryker in said five shares

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of the capital stock of the plaintiff or in any proceeds of said shares which may be offered to the directors of the plaintiff be determined and that said interests and the shares representing the same be seized and sold in such manner as the court shall order and the proceeds of said shares either upon sale ordered by the court or upon purchase by the plaintiff under said by-law be applied in satisfaction of the damages due from the defendant Stryker to the plaintiff.

6. That the defendant be enjoined perpetually as well as during the progress of this case from proceeding further with the actions against the plaintiff for breach of the contract.

7. That pending the trial of this case the defendant Stryker be enjoined from parting with or in any way disposing of his interest in the five shares of stock of the plaintiff corporation referred to in the bill.

8. For such other and further relief as to the court shall seem meet and proper.

The defendant Stryker demurred to the bill, as amended, for want of equity and for the following assigned reasons:

"This defendant further demurs to so much of the plaintiff's bill of complaint as relates to the judgments alleged to have been entered in actions of tort for libel in favor of this defendant against the plaintiff and the defendant Stone on June 25, 1917, because

"1. The plaintiff has in this regard a complete and adequate remedy at law.

"2. The bill shows the plaintiff and the defendant Stone to be joint tortfeasors *in pari delicto*, between whom there can be no right of contribution or subrogation which this court has jurisdiction to reach and apply.

"3. The bill shows no such relation between the plaintiff and the defendant Stone as to make it inequitable for this defendant to satisfy from the defendant Stone his judgment in the action of tort.

"4. The bill discloses an attempt on the part of the plaintiff to benefit by its own wrong, which equity will not aid.

"5. It is not equitable to allow the plaintiff to create for itself by its own malicious tort security for a claim in contract against the victim of that tort which claim existed prior to such malicious

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tort, nor to allow it to benefit by the consequences of the malicious act of one who committed such tort jointly with the plaintiff and for its benefit."

The demurrer was argued before *J. F. Brown*, J., who made an interlocutory decree sustaining the demurrer. The plaintiff appealed, and the judge, being of opinion that the questions raised by the demurrer were fundamental and ought to be determined before the parties went to a hearing upon the merits, reported the case and all questions raised by the record, including the appeal from the interlocutory decree sustaining the demurrer, for determination by this court.

F. L. Norton & E. A. Whitman, for the plaintiff.

F. W. Fosdick, for the defendant Stryker.

PIERCE, J. The allegation in the bill of an indisputable right in the plaintiff to have damages assessed by a jury against the defendant Stryker for a breach of an executory contract, because of the special finding of the jury in the action of tort that the contract was broken by the defendant, is but a conclusion of law and is not admitted by the demurrer. Should the right to damages be concluded by the finding, no debt was created thereby, nor could be until the wholly unliquidated damage arising from the breach of the executory contract was determined and the precise amount ascertained by the verdict of a jury and the entry of judgment thereon. *Rice* v. *Stone*, 1 Allen, 566, 570. *H. G. Kilbourne Co.* v. *Standard Stamp Affixer Co.* 216 Mass. 118.

The plaintiff is not a judgment creditor of the defendant, and holds no debt obligation of the defendant within the meaning of that word in R. L. c. 159, § 3, cl. 7, as amended by St. 1902, c. 544, § 23, and St. 1910, c. 531, § 2. *H. G. Kilbourne Co.* v. *Standard Stamp Affixer Co. supra.*

Because the claim of the plaintiff against the defendant for breach of an executory contract is not a debt, or a promise to pay a sum of money which can be ascertained by simple computation, or one which has been liquidated by judgment, the equity court, in which this bill is filed, has not jurisdiction to restrain the defendant from collecting his judgment against the plaintiff and the defendant Stone, pending the termination of this suit. Nor has it authority to determine that in equity the primary duty to pay the obligation of the judgment was on Stone; or that the plaintiff

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was secondarily liable and entitled to be indemnified by Stone if compelled to pay; or that the plaintiff without payment of the judgment debt should be subrogated to the right of the defendant against Stone and the amount due the defendant from Stone be set off against the sum found to be due the plaintiff from the defendant.

It is plain the court has not jurisdiction to entertain the bill under St. 1910, c. 531, § 2, which amends R. L. c. 159, § 3, cl. 7, by adding at the end thereof the following: "Also suits to reach and apply shares or interests in corporations organized under the laws of this Commonwealth or of the United States, and located or having a general office in this Commonwealth, whether the plaintiff is a creditor or not, and whether the suit is founded upon a debt or not," because at the filing of the bill the defendant had no present ownership in stock or shares of stock in the plaintiff corporation, or any present interest in that corporation. The possibility that the court, in the bill now pending to compel Stone to effect a transfer of stock in the plaintiff corporation, may order specific performance of the agreement of Stone to transfer the stock to the defendant, is neither an ownership of shares nor an interest in the corporation within the meaning of the statute.

It follows that the interlocutory decree sustaining the demurrer must be affirmed.

Decree accordingly.

JACOB DONDIS *vs.* WILLIAM A. BORDEN.

Bristol. January 2, 1918. — March 4, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Contract, Performance and breach, Building contracts. *Practice, Civil*, Exceptions. *Proximate Cause*. *Damages*, For breach of contract.

In an action on a contract in writing, by which the defendant agreed to construct a building for the plaintiff, for damages caused by the defendant's failure to make the building waterproof, whereby the plaintiff's goods stored there became damaged, it appeared that the contract provided that the work was to be done under the direction of the architect and "that no certificate given or payment made under this contract, except the final certificate or final payment, shall be

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conclusive evidence of the performance of this contract." It could have been found that the architect permitted a variation from the specifications in the work of waterproofing to which the plaintiff did not assent. A finding was warranted that no final certificate ever was given or intended to be given by the architect as arbitrator under the contract, and an auditor to whom the case had been referred found that "at the time the certificate of final payment was given the defendant had not performed the work" or furnished the "materials required by the specifications; that the architect could easily have ascertained this, and was negligent in not doing so." It was conceded that the basement of the building had not been made waterproof as called for by the contract. The presiding judge refused to make a ruling requested by the defendant, that "The original contract was conclusively settled by the making and acceptance of the final certificate and payment," and also refused to instruct the jury "that the plaintiff could not recover on the principal contract because of the issuance of the architect's final certificate and payment thereunder." *Held*, that the refusal of the judge to make the rulings requested was right.

In the case above described it also was *held* that the judge properly refused to rule that the plaintiff could not recover under a certain guaranty clause in the contract, because the request for the ruling was inappropriate, the plaintiff having made no claim under that clause.

In the case above described the plaintiff sought to recover for damage to "his dry goods and other merchandise" caused by the defendant's failure "to put up a building that shall be waterproof." The auditor found "that the defendant knew that said basement was to be used for the storage of dry goods and merchandise," and further found "that the plaintiff's goods and merchandise in the basement became damp and mouldy due to the absence of waterproofing," and there also was oral evidence warranting the jury in making this finding. The presiding judge refused to make a ruling requested by the defendant that, "Even though the defendant knew that the store was to be used for the storage of goods, the plaintiff [defendant] would not be liable for damage thereto because the defendant's act in omitting the waterproofing would not be the proximate cause of such damage." *Held*, that the judge was right in refusing to make this ruling, because the jury could find that the plaintiff's damages were such as reasonably might be supposed to have been within the contemplation of the parties if at the time of making the contract they had taken thought of the consequences likely to ensue if the waterproofing as specified were omitted.

CONTRACT upon a contract in writing, further described below, to construct a building for the plaintiff for stores and tenements on East Main Street in Fall River. Writ dated January 22, 1912.

The plaintiff's substituted declaration, filed by consent on November 5, 1912, was as follows:

"And the plaintiff says that on or about the first day of August, 1910, he and the defendant entered into a written contract, a copy of which is hereto annexed, and made a part hereof. And the plaintiff says that he has fully and faithfully performed and carried out all his engagements and agreements set forth in said instru-

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ment, but the defendant, not regarding the same, has neglected and refused to carry out the same, and did not use in erecting said building materials such as he agreed to use, did not employ upon its erection skilled and competent workmen, did not do said work or cause the same to be done in a good and workmanlike manner, and did not erect and complete said building in accordance with the drawings and specifications set forth in said contract, but erected and delivered a greatly inferior building of poor and insufficient materials and of improper and defective workmanship, to the plaintiff's great loss and damage."

On August 3, 1915, the plaintiff was allowed to amend his declaration by adding a second count, as follows:

"Second count. The plaintiff says the defendant contracted according to agreement, a copy of which is annexed, to put up a building that shall be waterproof and in accordance with certain specifications. The plaintiff says said building was not constructed as agreed and that as a result thereof his dry goods and other merchandise put in said building became moist and mouldy and were therefore damaged.

"The plaintiff further says the defendant knew the plaintiff intended to use said building for such purpose."

The defendant's answer, filed on November 9, 1912, was as follows:

"And now comes the defendant in the above entitled cause and for answer denies each and every allegation in the plaintiff's writ and declaration.

"And further answering, without waiving any of the above allegations, said defendant says that whatever agreement he has made with said plaintiff respecting the building of any house whatever he has fully performed.

"And without waiving any of the above allegations, but insisting thereon, the defendant further says that he did build for said plaintiff a certain house, and fully performed all by said defendant to be done and performed under the agreement made respecting said house, and that said plaintiff accepted said house as fully completed, and thereby released said defendant of and from all obligations respecting said house."

The contract declared upon contained, among others, the following provisions:

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"Article 2. It is understood and agreed by and between the parties hereto that the work included in this contract is to be done under the direction of the architect, and that his decision as to the true construction and meaning of the drawings and specifications shall be final.

"Article 3. No alterations shall be made in the work except upon written order of the architect."

"Article 9. The contract price shall be paid only upon certificates of the architect as follows: 85% of amount of work done. Payments to be made monthly and final payment when building is accepted by the architect. All payments shall be due when certificates for the same are issued.

"Article 10. It is further mutually agreed between the parties hereto that no certificate given or payment made under this contract, except the final certificate or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part, and that no payment shall be construed to be an acceptance of defective work or improper materials."

The specifications contained, among others, the following material clauses, each of which applied to the entire contract:

"Waterproofing. After the stone walls have been faced, inside the walls and bottom of north cellar will be waterproofed; the entire height to grade with two coats of felt and one coat of burlap well mopped in and coated with asphalt, then cellar walls to have a lining of four inches thick of brick laid in cement mortar."

"Guarantee. The contractor is at his own cost to amend and make good any defects or faults in his work, occurring from poor workmanship or materials, which may appear within twelve months after completion of the building."

The case was tried before *J. F. Brown*, J. The findings of the auditor to whom the case was referred and the findings warranted by the evidence at the trial are stated in the opinion. At the close of the evidence the defendant filed a motion in writing that a verdict be ordered for him. The judge denied the motion, and the defendant then asked the judge to make the following rulings:

"1. The original contract was conclusively settled by the making and acceptance of the final certificate and payment.

"2. Even though the defendant knew that the store was to be used for the storage of goods, the plaintiff [defendant] would not

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be liable for damage thereto because the defendant's act in omitting the waterproofing would not be the proximate cause of such damage.

"3. The declaration is not so drawn as to entitle the plaintiff to recover in this action on the so called guarantee."

The judge refused to make any of these rulings. It was stated in the bill of exceptions that the judge "charged the jury correctly and fully as to the law on all branches of the case, but refused to instruct the jury that upon all the evidence the architect's final certificate was in any way final and conclusive upon the parties, or that the plaintiff could not recover on the principal contract because of the issuance of the architect's final certificate and payment thereunder, — or that he could not recover for the damage to goods stored in the basement, — or that he could not recover under the pleadings for defects and faults appearing after the completion of the building."

The jury found for the plaintiff in the sum of $1,430; and the defendant alleged exceptions.

The case was submitted on briefs.

A. S. Phillips & T. C. Crowther, for the defendant.

D. R. Radovsky & F. A. Pease, for the plaintiff.

BRALEY, J. The refusal of the defendant's first request, asking for a ruling that "The original contract was conclusively settled by the making and acceptance of the final certificate and payment," as well as the refusal to instruct the jury "that upon all the evidence the architect's final certificate was in any way final and conclusive upon the parties, or that the plaintiff could not recover on the principal contract because of the issuance of the architect's final certificate and payment thereunder," shows no error of law.

The defendant relies upon the clause of the contract which provides that "no certificate given or payment made under this contract, except the final certificate or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part, and that no payment shall be construed to be an acceptance of defective work or improper materials." But the jury could find on conflicting evidence that the plaintiff never agreed to a substituted performance as to the waterproofing to which the architect testified. A further finding also would have

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been warranted that no final certificate was ever given or intended by the architect to be given in accordance with the terms of the original contract, under which he was to act as if he were an arbitrator. The auditor moreover has found, and there is no evidence to contradict his report, that "at the time the certificate of final payment was given the defendant had not performed the work" or furnished the "materials required by the specifications; that the architect could easily have ascertained this, and was negligent in not doing so."

The present case, therefore, is plainly distinguishable from *Hathaway* v. *Stone*, 215 Mass. 212, and the plaintiff is not estopped from contending that, the building not having been completed in accordance with the specifications, he is entitled to damages notwithstanding the architect's certificate of final payment with which he has complied. *Handy* v. *Bliss*, 204 Mass. 513. And the jury on the auditor's report would be warranted in finding "that the work and material which had not been furnished and performed consisted of the furnishing of an inadequate heating apparatus . . . omissions to waterproof the cellar, . . . and a shortage in the height of the sheathing." It was not contended by the defendant that the basement had been made waterproof as called for by the contract, and, whether the plaintiff as the architect testified agreed to a substituted performance, was as we have said for the jury.

The third request, for a ruling that, under the declaration as framed the plaintiff could not recover "on the so called guarantee" was inappropriate. While the contract contained a clause that the contractor at his own expense is to make good "any defects or faults in his work, occurring from poor workmanship or materials, which may appear within twelve months after completion of the building," neither the substituted nor amended declaration contains a count on the guaranty, and on the record the parties and the judge must have understood that the plaintiff made no claim under it.

It is stated in the bill of exceptions that the court "charged the jury correctly and fully as to the law on all branches of the case," unless the first request and the second request should have been given. The plaintiff under the second count having asked for damages to "his dry goods and other merchandise" caused by the defendant's

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failure "to put up a building that shall be waterproof," the judge by the second request was asked to rule, that, even if he knew the store was to be used for the storage of goods, the defendant "would not be liable for damage thereto because the defendant's act in omitting the waterproofing would not be the proximate cause of such damage." The refusal to give this ruling is the remaining question. It is settled by *Weston* v. *Boston & Maine Railroad*, 190 Mass. 298, 299, and *Hanson & Parker, Ltd.* v. *Wittenberg*, 205 Mass. 319, 327, 328, that, although the contract contains no reference to the use which the plaintiff intended to make of the building, evidence is admissible to show knowledge by the parties of the circumstances on the basis of which the contract was made. And, "as damages are assessed as compensation, the amount awarded should be such as the parties at the time of the making of the contract are supposed to have contemplated naturally would follow from the probable consequences of a breach." The auditor found "that the defendant knew that said basement was to be used for the storage of dry goods and merchandise," and the jury could find on the evidence as the auditor further found, "that the plaintiff's goods and merchandise in the basement became damp and mouldy due to the absence of waterproofing." The defendant relies on *Hadley* v. *Baxendale*, 9 Exch. 341, where in an action against a common carrier special damages were sought for loss of profits, caused by the carrier's unreasonable delay in delivering a broken mill shaft to be used by the consignee as a pattern for the making of a new one, but which were denied, as decisive of the plaintiff's right to recover. But, as pointed out in *Gagnon* v. *Sperry & Hutchinson Co.* 206 Mass. 547, 555, citing among other cases *Hadley* v. *Baxendale*, *supra*, the loss of prospective profits may be allowed if the loss likely to result from non-performance is within the contemplation of the parties, and "the profits are not so uncertain or contingent as to be incapable of reasonable proof." The general question also was considered in *Leavitt* v. *Fiberloid Co.* 196 Mass. 440, 444–449, with a very full review of English and American cases, which without further citation abundantly show that recovery may be had where, as in the present case, the jury could find that the plaintiff's damages were "such as reasonably might be supposed to have been within the contemplation of the parties if at the time" of making the

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contract "they had taken thought of the consequences likely to ensue" if the waterproofing as specified were omitted. The exceptions therefore should be overruled, and it is

So ordered.

JAMES L. MACLARY & another *vs.* EARLE MORGAN.

Norfolk. March 5, 1918. — April 9, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Equitable Restrictions. Equity Pleading and Practice, Report by judge. *Equity Jurisdiction,* Mandatory injunction.

In a suit in equity, by the owner of one of the lots shown on a plan recorded with the deeds given by the common grantor of all the lots shown on the plan, to compel the owner of the adjoining lot to remove a house which he had built in violation of the restrictions contained in his deed, where the trial judge reported the case for determination by this court, a statement in the report, that the trial judge ruled that the plaintiff "as the owner of one of the lots is a person for whose benefit the restrictions were imposed, and is entitled to a mandatory injunction," necessarily implies a finding by the judge that the original owner imposed the same restrictions on each of the lots on a street shown on the plan as a part of the general scheme of improvement and for the benefit of the purchasers of the several lots.

Where a grantor conveyed a tract of land, cut up by him into thirteen lots according to a plan recorded with the deed in the registry of deeds, and imposed restrictions "that no buildings other than private residences intended for single families only and the necessary outbuildings shall be erected or placed thereon and no building shall be erected nearer the street in any case than 20 feet," except certain projections, and not "nearer than five feet to any boundary line," and where the general grantor intended to impose on each grantee a liability not only to the grantor himself for the protection of his other adjoining land, but also that the benefit of the restrictions should enure to each purchaser of a lot shown on the plan with the equitable right to enforce them against the other grantees, a purchaser of such a lot can maintain a suit in equity for a mandatory injunction against the owner of the adjoining lot, who was one of the original grantees, ordering him to remove a two-family house which he has erected on his lot nearer than five feet to the boundary line.

BILL IN EQUITY, inserted in a common law writ of the Superior Court dated January 12, 1916, by the owner of a lot of land with a dwelling house thereon on Hollis Street in the part of Milton called East Milton, being lot No. 3 on the plan mentioned in the opinion, against the owner of the adjoining lot, also shown on the plan, to enjoin the defendant from maintaining and to compel

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him to remove a two-family house which the defendant had built less than five feet from the boundary line between the two lots in alleged violation of the equitable restrictions contained in the defendant's deed, which are quoted in the opinion.

The case was heard by *Fox*, J., who ruled that the defendant had violated the restrictions in that the house erected by him was a two-family dwelling house and was less than five feet from the plaintiff's side line, and that the plaintiff, as the owner of one of the lots on the plan was a person for whose benefit the restrictions were imposed and was entitled to a mandatory injunction. At the request of the defendant the judge reported the case for determination by the full court.

L. S. Hamburger, for the defendant.

M. E. Sturtevant, for the plaintiffs.

De Courcy, J. In January, 1913, E. W. Bowditch, the owner of two tracts of land on Edgehill Road and Hollis Street in Milton, caused a plan to be made dividing the land into thirteen lots and sold and conveyed the same to the defendant and Leroy Morgan. The deed recited, "The granted premises are shown on a plan hereto annexed and herewith to be recorded." The plan thereby became incorporated in the deed. *Kaatz* v. *Curtis*, 215 Mass. 311. In March, 1914, the Morgans, by joint deed with warranty covenants, conveyed to the plaintiffs a lot on the southerly side of Hollis Street and numbered 3 on the plan. In August, 1914, there was conveyed to the defendant the undivided one half interest of Leroy Morgan in five of the lots, — including lot 2, which is contiguous to the lot of the plaintiffs. The plan and all of the deeds were duly recorded.

The deed from Bowditch to the Morgans contained the following restrictions: "The above property is hereby conveyed subject to the following restrictions, namely: that no buildings other than private residences intended for single families only and the necessary outbuildings shall be erected or placed thereon and no building shall be erected nearer the street in any case than 20 feet with the exception that piazzas, porches and bay windows may extend 8 feet into said 20 foot reservation. Steps appurtenant to any building may project into the reservation so far as is necessary, and no other building or other structure shall be placed nearer than 5 feet to any boundary line."

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All the houses so far erected on Hollis Street, including that built by the plaintiffs on lot 3, are single family houses, built in conformity with the restrictions, with the exception of the one on lot 2 recently completed by the defendant. This is a two-family house, and is within five feet of the dividing line between lot 2 and the lot of the plaintiffs. The plaintiffs promptly notified the defendant of their objection to the proposed house, calling attention to the provisions in the Bowditch deed; and in January, 1916, this bill in equity was brought to enforce the restrictions.

The ruling of the trial judge was "that the plaintiff as the owner of one of the lots is a person for whose benefit the restrictions were imposed, and is entitled to a mandatory injunction." This necessarily implies a finding by the judge that the original owner, Bowditch, imposed the same restrictions on each of the lots (on Hollis Street at least) as part of a general scheme of improvement, and for the benefit of purchasers of the several lots. In the absence of the evidence we cannot say that such a finding was unwarranted. The judge had before him not only the terms of the original deed, but the situation and attendant circumstances from which he could infer that Bowditch intended not only to impose on each grantee a liability to himself, for the protection of his other adjoining land, but also that there should enure to each purchaser of a lot the benefit of the restrictions, and an equitable right to enforce them against other grantees. *Parker* v. *Nightingale*, 6 Allen, 341. *Hano* v. *Bigelow*, 155 Mass. 341. *Allen* v. *Barrett*, 213 Mass. 36. Ann. Cas. 1913 E 822, note. And the defendant not only had notice that his lot 2 was subject to the restrictions, but he was one of the original grantees, and was charged with the obligation to convey the lots on Hollis Street subject to the restrictions. *Riley* v. *Barron*, 227 Mass. 325.

The plaintiffs are entitled to a writ of injunction enjoining the defendant from maintaining his building in violation of the restrictions set forth in the Bowditch deeds, the terms of the decree to be settled by the Superior Court.

Decree accordingly with costs.

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COMMONWEALTH *vs.* LEMUEL F. NOBLE.

Suffolk. March 12, 1918. — May 21, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Narcotic Drugs. Physicians and Surgeons.

At the trial of an indictment under St. 1915, c. 187, § 2, charging a physician with prescribing narcotic drugs, including morphine, cocoaine and heroin, to different persons alleged to be habitual users of those drugs and known to the defendant to be such, the defendant contended that the persons to whom he prescribed the drugs were persons on whom he personally attended in good faith under § 3 of the act for the purpose of curing them of the habit of the use of such drugs and that such prescribing was not for the purpose of evading the provisions of the act within the meaning of the statute. Upon the issue of the defendant's good faith the evidence was conflicting. *Held*, that it was a question of fact for the jury whether the defendant believed that the drugs prescribed by him were needed for the treatment of the persons for whom he prescribed, or whether he was engaged in the business of issuing prescriptions to habitual drug users solely for his pecuniary gain and without reference to the question whether such drugs were needed by those who obtained them or not.

In the case above described the defendant asked the presiding judge to rule "that, being the attending physician in the cases referred to in the indictment, he was the only person who could then determine the obvious necessity for the therapeutic treatment after examination and history of the patient; that his judgment in the matter was conclusive and could not be reviewed or inquired into in a court of law in a trial of an indictment of this kind." The judge refused to make the ruling requested. *Held*, that the refusal of the judge was right; and it was *said*, that to hold that the defendant's honesty of purpose could not be inquired into would be to defeat the manifest purpose of the act.

INDICTMENT, found and returned in the Superior Court for the county of Suffolk in January, 1917, under St. 1915, c. 187, §§ 2, 11, charging the defendant with unlawfully prescribing, when not obviously needed for therapeutic purposes, certain narcotic drugs, including morphine, cocaine and heroin, to fifteen different persons named in the indictment and alleged to be habitual users of those drugs and known to the defendant to be such.

The defendant was tried before *Morton*, J. The evidence is described in the opinion. The defendant asked the judge to make the ruling which is quoted in the opinion. The judge refused to make this ruling, and submitted the case to the jury with other instructions, which concluded as follows: "The question of

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obvious necessity to prescribe the drug and of the purpose for which it is prescribed is, as has been testified to, largely a matter of common sense. If you are satisfied beyond a reasonable doubt that the drug was not obviously needed and that the purpose of the defendant Noble in prescribing it was not in good faith to cure, but for the purpose of evading the law, then he is guilty."

The jury returned a verdict of guilty on all the counts of the indictment, and the judge at the request of the defendant reported the case for determination by this court. The report stated that it was not contended by the defendant that there was any error in the judge's charge except in so far as it was inconsistent with the ruling requested, and that the refusal of the judge to make that ruling raised the only question submitted for determination by this court.

St. 1915, c. 187, § 2, and the beginning of § 3 are as follows:

"Section 2. It shall be unlawful for any practitioner of veterinary medicine or surgery to prescribe any of the drugs mentioned in section one of this act for the use of a human being, and it shall be unlawful for any physician or dentist to prescribe, sell, give away or deliver any coca leaves or any cocaine or any alpha or beta eucaine or any compound, derivative or synthetic substitute for them, or opium, morphine, heroin, codeine or any preparation thereof, or any salt, compound or derivative of said substances to any person known to such physician or dentist to be an habitual user of those drugs, except when the drug is obviously needed for therapeutic purposes.

"Section 3. The provisions of this act shall not be construed to prevent any lawfully authorized practitioner of medicine, dentistry, or veterinary medicine from prescribing, administering, dispensing or distributing any of the drugs mentioned in this act that may be indicated for any patient under his care: provided, that such prescribing, administering, dispensing, or distributing is not for the purpose of evading the provisions of this act; . . ."

D. J. Daley, for the defendant.

A. C. Webber, Assistant District Attorney, for the Commonwealth, was not called upon.

CROSBY, J. This is an indictment wherein the defendant is charged in ninety-six counts with unlawfully prescribing narcotic drugs, including morphine, cocaine and heroin, when not obviously

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needed for therapeutic purposes, to persons known to the defendant to be habitual users of such drugs, in violation of St. 1915, c. 187, § 2.

It is provided in § 3 of the act, in part, that it shall not be construed to prevent a lawfully authorized physician from prescribing any of the drugs mentioned in the act that may be indicated for any patient under his care, provided that such prescription is not for the purpose of evading the provisions of the act. The gist of the offence charged in the several counts is that the defendant, a physician, unlawfully prescribed drugs to fifteen different persons, alleged in the indictment to be habitual users of the above named drugs and known to the defendant to be such. The jury returned a verdict of guilty on all the counts, and, after a sentence was imposed, it was stayed until further order; and the case is reported to this court at the request of the defendant, who contends "that, being the attending physician in the cases referred to in the indictment, he was the only person who could then determine the obvious necessity for the therapeutic treatment after examination and history of the patient; that his judgment in the matter was conclusive and could not be reviewed or inquired into in a court of law in a trial of an indictment of this kind and he requested the court to so rule." The presiding judge refused so to rule and gave to the jury certain instructions which it is not contended by the defendant were erroneous except in so far as they were inconsistent with the ruling requested. The only question presented for our determination is whether the defendant was entitled to the ruling above referred to.

The Commonwealth contended at the trial, and offered evidence to show, that the defendant made it a regular practice to give prescriptions to habitual users of morphine, cocaine and other narcotic drugs, knowing them to be such, which enabled them to obtain possession and control of large quantities of such drugs, and that he knew that they were to be taken by habitual users thereof, — self-administered by means of a hypodermic syringe, — while the patients were at large and not under his control; that by means of such prescriptions the persons receiving them were not only supplied for their own uses, but were also able to furnish the drugs to other habitual users. There was evidence that the defendant received $2 for each prescription so furnished by him.

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The Commonwealth also offered evidence that any method of treating a drug addict (as habitual users of narcotic drugs are called) not under the complete control and supervision of the physician, by prescribing narcotic drugs to be administered by the patient, had no justification in the practice of medicine; that under such a course of treatment the patients were free to go from one doctor's office to another and thus secure a supply of such drugs as they desired. There was also evidence that the defendant prescribed morphine and cocaine combined, that cocaine was prescribed for habitual users of that drug, and that such methods of treatment were improper and without justification; that the doses prescribed by the defendant were excessive in amount and were contrary to the legitimate practice of medicine; that the system followed by the defendant was to prescribe fifty or sixty grains of morphine sulphate to each patient as the initial prescription and every few days thereafter a similar prescription, calling for a single grain less than the preceding prescription, would be issued to the patient; and that in many prescriptions a quantity of cocaine would also be prescribed and reduced in the same manner.

The report recites that the Commonwealth called, among other witnesses, the persons named in the indictment, who testified that they had received the prescriptions set forth in the various counts on the dates alleged; that they were habitual users of these drugs and had been for some time — in many instances for years — and that they so informed the defendant; that in several cases they gave assumed names and addresses to the defendant; that they called upon him for treatment for drug addiction and for nothing else; that the drugs so obtained were to be self-administered hypodermically, and while the patients were not under the control of the defendant; that in some instances, without the knowledge or consent of the defendant, they had supplied other addicts with drugs from the amounts prescribed by him.

The defendant testified that each one of the fifteen persons named in the indictment was treated by him as his patient in the practice of medicine; that when they gave their names and addresses he believed they were telling the truth; that when they came to him for treatment he talked with each one about his individual case in great detail; and advised them to go to some institution to be treated and cured of the habit as that was the best

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way to be cured; that, if otherwise well, they could be cured of the disease; that they gave him reasons why they could not go to an institution at that time and told him that they would or thought they could go at a later time; that on subsequent occasions he urged them to be treated in some institution; that he continually cautioned them to adhere to his instructions and warned them that any departure therefrom would result in his finally dismissing them from further treatment; that in addition to the drugs, he gave them other medicines with instructions for taking. The defendant also testified (and offered expert testimony in support thereof) that the treatment he gave to these persons was in his opinion obviously necessary for therapeutic purposes, and was in accordance with his theory of treatment of drug addicts; that in his opinion a sudden withdrawal of the drug was harmful to the patient and that he believed this gradual reduction treatment was the best, and was necessary to alleviate the suffering of a patient, with the ultimate purpose of effecting a cure. On the other hand the Commonwealth introduced expert witnesses who testified that in their opinion such a prolonged reduction treatment was not necessary; that even a sudden withdrawal of the drug was not dangerous, and that they had never known of a case resulting fatally therefrom.

The indiscriminate use of narcotic drugs has long been recognized as a great and growing evil, and statutes have from time to time been passed by the federal government, and by many of the States, to control and restrain the use and sale of such drugs and to place the control of such sales in the medical profession. The statute in question was enacted to limit and control further the use of such drugs by prohibiting the giving of prescriptions therefor by unscrupulous practitioners to habitual users of drugs, "except when the drug is obviously needed for therapeutic purposes." The statute (§ 3) at the same time provides for the protection of reputable physicians who act honestly and in good faith.

While the question whether the drug is or is not obviously needed for therapeutic purposes in a given case is a question for the attending physician and he is not to be held liable for a violation of the statute if he acts in good faith, it does not follow that his judgment in the matter is conclusive and cannot be reviewed or inquired

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into in a prosecution for an alleged violation of the statute. In the case at bar, upon conflicting evidence and the reasonable inferences to be drawn therefrom, it was a question of fact whether the defendant believed the drugs prescribed by him were obviously needed for the treatment of the persons for whom he so prescribed, or whether he was engaged in the business of issuing prescriptions to habitual drug users at $2 each, solely for his pecuniary gain and without reference to the question whether such drugs were obviously needed by those who obtained them or not.

If the jury found beyond a reasonable doubt upon the evidence, including the expert testimony, that the method of treatment was improper and unjustifiable, and was known to be such by the defendant, and that his conduct was such as to satisfy the jury that he was attempting by an ingenious scheme and plan of procedure to evade the statute under the guise of a pretended system of medical treatment for habitual drug users, they would be warranted in finding him guilty.

The question whether the defendant exercised his honest professional judgment and acted in good faith or whether he intentionally violated the statute, was a question of fact for the jury to be determined by them as men of practical sense and sound judgment. To hold that the honesty of purpose of the defendant, — whether in good faith he was of opinion that the drugs were obviously needed, — cannot be inquired into when he is charged with a violation of the statute, would be to defeat its manifest purpose and leave the community without adequate protection from the acts of unscrupulous and dishonest physicians. The presiding judge rightly refused the defendant's request, and, as the instructions given were correct, the entry must be

Verdict to stand.

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THOMAS WALSH *vs.* FORE RIVER SHIPBUILDING COMPANY.

Suffolk. March 22, 1918. — May 21, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Release. Physicians and Surgeons. Contract, Validity. *Evidence*, Presumptions and burden of proof. *Practice, Civil*, Ordering verdict.

At the trial of an action by an employee against his employer, a corporation, for personal injuries, the plaintiff admitted that, nearly three weeks after he was injured, he received money from the defendant and signed an instrument purporting to release and discharge it from all claims relating thereto and that he understood the contents of the instrument. There was evidence tending to show that, immediately after his injury, the plaintiff received first aid treatment in the accident room of the defendant's works from a physician in its employ, that shortly afterwards the plaintiff was removed to a hospital, that about a week later the defendant's physician called there and on that and on two subsequent occasions talked with the plaintiff, who knew that he was the defendant's physician, on the subject of a settlement with the defendant, making to the plaintiff, as an inducement for him to consummate a settlement, certain statements as to his opinion of the early date and probable completeness of the plaintiff's recovery, and that the plaintiff at his suggestion wrote to him a letter regarding settlement. There was no evidence that the defendant's physician ever gave the plaintiff any treatment after the first aid treatment, or that his statements of his opinion as to the plaintiff's recovery were made fraudulently or in bad faith or that the plaintiff's condition when he signed the release and received money therefor was such as to make him incompetent to act. A verdict was ordered for the defendant. *Held*, that the verdict was ordered rightly.

In the action described above, it was *held* that the evidence did not warrant a finding that the relation of physician and patient, or any relation of trust and confidence, existed between the defendant's physician and the plaintiff.

In the same case it was *pointed out* that there was nothing to indicate that the statements of the physician were other than statements of his honest opinion given in accordance with his best professional judgment based on existing symptoms.

TORT for personal injuries received by the plaintiff on March 25, 1912, while in the employ of the defendant. Writ dated June 19, 1913.

The defendant, besides a general denial, set up as a defence the instrument which is quoted in full in the opinion.

The case was tried before *Chase*, J. The material evidence is described in the opinion. At the close of the evidence the judge

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ordered a verdict for the defendant; and the plaintiff alleged exceptions.

W. B. Grant, (*F. W. McEnery* with him,) for the plaintiff.

J. W. McAnarney, (*P. G. Carleton* with him,) for the defendant.

CROSBY, J. The plaintiff was injured on March 25, 1912, through the alleged negligence of the defendant, by whom he was employed, and on April 17, 1912, executed and delivered to the defendant a written instrument a copy of which is as follows:

"Received of Fore River Shipbuilding Co. this 17th day of April, 1912, the sum of Two Hundred and fifty Dollars in full satisfaction and discharge of all claims accrued or to accrue in respect of all injuries or injurious results, direct or indirect, arising or to arise from an accident sustained by me on or about the 25th day of March, 1912, while in the employment of the above. This release is given with the understanding that the Fore River Shipbuilding Company will pay my hospital and treatment bills and that they will have me continued on the benefit list of the Accident Association until I am able to resume work, or until the amount of benefits reach the limit paid by the Accident Association.

Thomas Walsh (Seal)

Witness:

G. H. Poirier, M. D.

W. H. Blanchard, M. D."

Immediately after the plaintiff was injured he received first aid treatment in the accident room at the defendant's works from Dr. Blanchard, a physician in the defendant's employ and in charge of its hospital; about an hour later he was taken by train to Grace Hospital in Boston, where he thereafter was treated by physicians connected with that hospital; within two or three days Dr. Blanchard came to the hospital and talked with him with reference to a settlement for the injuries which he had sustained, and about a week later again called and talked with the plaintiff with reference to a settlement; the plaintiff testified that the doctor came to the hospital three times before April 17, 1912, and talked with him respecting a settlement, and that on the third occasion "he said write to him, to the company, in regards to settlements;" that he (the plaintiff) wrote a letter to Dr. Blanchard and that the

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latter came to see him on April 17, and the release was signed. The plaintiff testified in substance that on each occasion when he talked with the doctor at the hospital the latter told him he would be all right in ten weeks and able to go to work and that his leg would be "just as good as ever;" that on the day he signed the release Dr. Blanchard told him all hospital bills would be paid by the company, that he would have a job for life with the defendant, and that he would have the benefits of accident insurance. And further, that on each occasion when Dr. Blanchard called to see him he was suffering acute pain as the result of the treatment of his injured leg.

It is the contention of the plaintiff that he is not bound by the release because of his condition when it was signed, and also, because it was procured by the fraud and false representations of Dr. Blanchard, upon whose statements he relied; and that his relation to the doctor was one of trust and confidence.

On June 10, 1913, the plaintiff's attorney tendered to the defendant the sum of $250 with interest, and requested a return to the plaintiff of the release. The defendant refused to accept the money or the tender or to return the release. The record shows that in addition to the $250 paid the plaintiff the defendant paid hospital bills for the plaintiff's treatment amounting to $846.09. That amount has not been paid or tendered to the defendant.

There was no evidence that the defendant's physician, Dr. Blanchard, treated the plaintiff aside from the first aid treatment rendered immediately after the accident; it appeared that on each subsequent occasion when the doctor saw him it was solely with reference to a settlement for the plaintiff's injuries; and that the plaintiff knew Dr. Blanchard was the defendant's physician and was acting for it in the matter of a settlement. There is nothing to show that the plaintiff had any right to rely on the statements of the doctor or that the relation of physician and patient existed between them or that there were any relations of trust and confidence between them. In this respect, the case of *Butler* v. *Gleason*, 214 Mass. 248, cited and relied on by the plaintiff, is clearly distinguishable.

Apart from the treatment administered by Dr. Blanchard on the defendant's premises, the plaintiff was treated by other physicians, and it does not appear that he did not have ample

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opportunity to consult with them respecting his condition and prospects of recovery if he desired their opinions. The statements made by the doctor during the negotiations for settlement — that the plaintiff would recover from his injuries in ten weeks and would be permanently cured at the end of that time — were made in good faith; at least there is nothing in the record to indicate that such statements were made fraudulently or that they were other than the honest opinion of the physician given in accordance with his best professional judgment based on existing symptoms. *McNamara* v. *Boston Elevated Railway*, 197 Mass. 383. *Nelson* v. *Minneapolis Street Railway*, 61 Minn. 167. *Eccles* v. *Union Pacific Railway*, 7 Utah, 335. *Houston & Texas Central Railroad* v. *McCarty*, 94 Texas, 298. *Vandervelden* v. *Chicago & Northwestern Railway*, 61 Fed. Rep. 54. Cases which have held that it was for the jury to determine whether a release had been obtained by false representations are distinguishable from the case at bar, as in the present case there was no evidence which would warrant a finding that the release was procured by fraud or false representations. *Freedley* v. *French*, 154 Mass. 339. *McNicholas* v. *Prudential Ins. Co.* 191 Mass. 304. *Greene* v. *Corey*, 210 Mass. 536. *Comstock* v. *Livingston*, 210 Mass. 581. *Butler* v. *Gleason*, *supra*.

There is no evidence to warrant a finding that any false representations were made as to the contents of the release or that they were fraudulently concealed from the plaintiff. *Drohan* v. *Lake Shore & Michigan Southern Railway*, 162 Mass. 435.

The plaintiff contends that he was in great pain during all the time after he was injured until the release was signed. Nearly three weeks elapsed between the time when the first talk was had with reference to a settlement and the date of the release, and in the meantime the plaintiff had written to Dr. Blanchard respecting it in accordance with the latter's request. The plaintiff does not deny that he signed the release, nor contend that he did not understand its contents, and the testimony would not warrant a finding that his condition was such that he was incompetent to act at that time. *McNamara* v. *Boston Elevated Railway*, *supra*. *Farnum* v. *Brooks*, 9 Pick. 212, 220.

The presiding judge rightly directed the jury to return a verdict for the defendant, and the entry must be

Exceptions overruled.

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MARY BARRANGO *vs.* HINCKLEY RENDERING COMPANY.

Suffolk. March 4, 1918. — May 22, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Dangerous Substance. Soap. Negligence, Of merchant. *Evidence, Res ipsa loquitur.*

In the absence of negligence, a retail dealer in selling a commodity not inherently harmful or dangerous is not liable in tort for personal injury resulting from its condition.

Testimony of a driver of a team for a rendering plant, who in behalf of his employer collected soap grease, giving in payment therefor soap which it did not manufacture but acquired from others in the usual course of its business, that sometimes a nail was found in bars of the soap and that he examined them before delivering them to purchasers, is not evidence tending to show that the presence of a needle in a bar of soap given by the driver to a customer was due to negligence of the driver or of his employer.

The mere fact, that a member of the family of the customer to whom the bar of soap was delivered by the driver, as above described, was injured by a needle embedded in the soap, is not evidence of negligence of the driver or of his employer.

TORT for personal injuries caused by a needle in a bar of soap given to the plaintiff, acting for her mother, by the defendant in exchange for some bones. Writ dated March 20, 1916.

In the Superior Court the action was tried before *White*, J. The material evidence is described in the opinion. At the close of the evidence for the plaintiff, the presiding judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

G. P. Beckford, for the plaintiff.

J. F. Sullivan, for the defendant.

CROSBY, J. This is an action of tort to recover for personal injuries, received by the plaintiff while using a bar of soap in which a needle had become embedded. The plaintiff, a minor, acting as agent for her mother, exchanged with the defendant's employee "a dish of bones" for the soap in which the needle was concealed.

The defendant operated a rendering plant in Somerville and sent out its drivers and teams and collected soap grease, giving in payment therefor soap which it kept in large quantities in boxes

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at its factory. The defendant does not make soap from the grease which it purchases, nor does it manufacture the soap which it gives in exchange for grease; and while it does not appear from the record from whom the defendant purchased this soap, it is a reasonable inference that it was acquired either from the manufacturer or from others in the usual course of the defendant's business. Accordingly the defendant could not have been found to be a manufacturer of the soap, but was a retail dealer in selling the soap presumably purchased from another.

It is settled that, in the absence of negligence, a retail dealer in selling a commodity not inherently harmful or dangerous is not liable in tort for its defective condition which causes injury to another. *Lebourdais* v. *Vitrified Wheel Co.* 194 Mass. 341. *Crocker* v. *Baltimore Dairy Lunch Co.* 214 Mass. 177. *Thornhill* v. *Carpenter-Morton Co.* 220 Mass. 593. *Kusick* v. *Thorndike & Hix, Inc.* 224 Mass. 413. *Hasbrouck* v. *Armour & Co.* 139 Wis. 357.

There is nothing inherently dangerous in a bar of soap; and it does not appear how or when the needle became embedded in it, or that the defendant knew of its presence before delivering it to the plaintiff or could have known of it by the exercise of reasonable diligence. Whether it came there during the process of manufacture or afterwards is wholly a matter of conjecture. The testimony of the defendant's driver, in substance, that a nail is sometimes found in the bars and that he examines them before delivery to purchasers, is not evidence of negligence.

The case of *Hunt* v. *Rhodes Brothers Co.* 207 Mass. 30, cited by the plaintiff, is not an authority in favor of her contention. In that case the plaintiff was injured by reason of coming in contact with a tack embedded in a leg of lamb; it was admitted that there was evidence of negligence on the part of the defendant's servant, and the only question was whether there was sufficient evidence to warrant a finding that the husband of the plaintiff in purchasing the meat acted as her agent. This is not a case where the doctrine of *res ipsa loquitur* applies. *Kusick* v. *Thorndike & Hix, Inc. supra.*

As there was no evidence to warrant a finding that the defendant was negligent, the presiding judge rightly directed a verdict for the defendant.

Exceptions overruled.

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HARRISON W. MILLS *vs.* U. S. SLICING MACHINE COMPANY.

Suffolk. March 5, 1918. — May 22, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Contract, Of employment, Construction. *Agency*, Ratification of acts of agent. *Practice, Civil*, Requests and rulings. *Municipal Court of the City of Boston*. *Evidence*, Competency, Remoteness.

In an action of contract against a corporation for breach of a contract in writing whereby the defendant agreed to employ the plaintiff for a year, a contention by the defendant, that one, who purported to act in its behalf in making the contract with the plaintiff and afterwards in discharging the plaintiff, had no authority so to act, became immaterial where it appeared that the defendant by its letters and its conduct ratified such acts of its alleged agent.

In a contract in writing for the employment of a salesman working on a commission, a promise by the salesman that he will "not during the life of this contract handle or represent or be interested in the sale of any other goods of like kinds as those handled by the" employer, does not entitle the employer to the entire time of the salesman in the sale of its goods nor prevent the salesman from selling the products of others so long as he does not handle or represent or become interested in the sale of goods of like kinds to those handled by the employer.

The question, whether evidence as to damages, presented at the trial in the Municipal Court of the City of Boston of an action of contract for a breach of an agreement of employment, was admissible or was too uncertain and remote, is not raised upon a report by the trial judge stating that the defendant asked for and he refused to give a ruling that "on all the evidence the plaintiff is not entitled to recover," where there was evidence warranting a finding that the contract was broken by the employer and the judge so found.

CONTRACT, with a declaration in two counts, the first count being for breach of an agreement in writing for the employment of the plaintiff by the defendant for a period of one year as a salesman upon a commission, and the second count (made immaterial by the finding of the trial judge) being upon an account annexed for $167.50, alleged to be due to the plaintiff as a commission for the sale of a specified machine. Writ in the Municipal Court of the City of Boston dated November 16, 1916.

The evidence at the trial in the Municipal Court is described in the opinion. At the close of the evidence the defendant asked for the following rulings:

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"1. That the contract is one for personal services.

"2. That F. J. Shetter had no authority as agent of the defendant to employ or discharge the plaintiff.

"3. That the defendant has not broken its contract with the plaintiff.

"4. That there is no evidence on which the plaintiff can recover under count 1.

"5. That there is no evidence on which the plaintiff can recover in count 2.

"6. That on all the evidence the plaintiff is not entitled to recover."

The trial judge refused to give any of these rulings.

The judge found as follows:

"It would seem that there was sufficient evidence to justify a finding that the agent Shetter did have authority in this particular case not only to employ the plaintiff, but also to discharge him, but if there was not sufficient evidence to justify such a finding, there was ample and sufficient evidence showing the acts of the agent Shetter, both in employing and discharging the plaintiff were ratified and confirmed by the defendant. I am unable to make any of the findings of facts as requested by the defendant.

"I make my finding on the first count in the declaration. I do not pass on the second count in the declaration, as the damages suffered by the plaintiff in the first count exceed the jurisdiction of this court.

"I find as a fact that the plaintiff did give his personal services and attention under the contract declared on."

The judge found for the plaintiff in the sum of $2,000 and reported the case to the Appellate Division. The Appellate Division dismissed the report; and the defendant appealed.

R. P. Dellinger, for the defendant.

D. D. Corcoran, for the plaintiff.

CROSBY, J. This is an action of contract to recover damages for an alleged breach of a written contract entered into between the plaintiff and the defendant on May 6, 1916, by the terms of which the plaintiff was employed for one year from the date thereof to "personally solicit and take orders for slicing machines such as may be handled by the company."

In making the contract, one Shetter, a salesman in the employ

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of the defendant, acted for it. It is the contention of the defendant that Shetter had no authority to make the contract. The case was tried before a judge of the Municipal Court of the City of Boston, who found that the plaintiff signed in duplicate the contract declared on; that on the same date it was sent by Shetter, together with a report concerning the plaintiff's ability and qualifications, to the home office of the defendant at La Porte, Indiana; and that "Upon consideration of Mr. Shetter's report the proper officials decided to engage the plaintiff as salesman and executed the contract, forwarding a duplicate original to the plaintiff on or about May 8, 1916." Upon the foregoing facts a finding that the defendant ratified the acts of Shetter in making the contract on its behalf was amply justified.

The plaintiff began work immediately after receiving a duplicate of the contract signed by the defendant and continued in its employ until June 8, 1916, when he received from Shetter a letter dated June 7, 1916, stating that "The Company has decided to make a district territory out of Massachusetts, Maine, New Hampshire and Vermont, and for this reason we will have to cancel your contract," and directing the plaintiff to turn over to one Lemen certain stock, the property of the company. The defendant contended that Shetter had no authority to discharge the plaintiff. If the evidence were sufficient to warrant a finding in favor of that contention, still it could have been found that the defendant, in a letter written by it to the plaintiff on June 12, 1916, fully recognized and ratified such dismissal and placed Lemen in charge as its salesman of the territory previously covered by the plaintiff under his contract. The record shows that there was considerable correspondence between the plaintiff and the defendant, and between their respective attorneys after the plaintiff had been discharged. A finding was warranted that the plaintiff at no time waived his rights under his contract.

There was evidence that before entering into the contract in question, the plaintiff had been engaged as an agent in the sale of certain articles, which he continued to sell while in the employ of the defendant. It is the contention of the defendant that it was entitled to the entire time of the plaintiff in the sale of its goods, and that his acts in selling the products of others amounted to a breach of the contract. This contention cannot be sustained;

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there is nothing in the contract that limited the plaintiff to the sale of the defendant's goods exclusively, and no provision which entitled the defendant to his entire time. The only portion of the contract having any bearing on these questions is the last sentence of the seventh paragraph, which provides that "The salesman shall not during the life of this contract handle or represent or be interested in the sale of any other goods of like kinds as those handled by the company." But there is nothing to show that the goods sold by the plaintiff were such as in any way violated this clause. The contract contains no provision that the plaintiff should devote his entire time to the sale of the defendant's goods, nor can such a construction of its terms be implied. He was not employed at a definite salary but was entitled to receive a commission on sales actually made by him. The clause above quoted would seem to indicate that it was the intention of the parties that the plaintiff might sell other goods provided they were not "of like kinds as those handled by the company."

At the close of the evidence the defendant made six requests for rulings, which were refused; a finding was made for the plaintiff on the first count, and damages were assessed in the sum of $2,000.

The first request, "that the contract is one for personal services," was refused properly. While the contract in a sense was one for personal services, it was not, for the reasons above stated, a contract for the entire time of the plaintiff; accordingly the cases relied on by the defendant are not applicable.

The second, third and fourth requests could not have been given for the reasons already stated.

The fifth request has become immaterial as the court made no finding upon the second count.

The sixth request, "That on all the evidence the plaintiff is not entitled to recover," could not properly have been given, because a finding was warranted that the defendant had committed a breach of the contract, which would entitle the plaintiff to recover at least nominal damages; accordingly, it is unnecessary to determine whether the evidence relating to damages was admissible or was too uncertain and remote, as this question is not properly before us.

Order dismissing report affirmed.

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JOHN T. MURPHY'S (dependent's) CASE.

Norfolk. March 6, 1918. — May 22, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, & CROSBY, JJ.

Workmen's Compensation Act. Evidence, Presumptions and burden of proof, Matter of conjecture.

A man thirty-five years of age, a carpenter by trade, who was employed in a factory to help around generally, doing odd jobs with no regular hours and subject to call at all times, was told on a Saturday morning that after he had done certain things he could go home and return when it was necessary to care for the furnaces, but he did not go home, and the next morning at about half past ten o'clock the proprietor of the factory found him sitting on a box in front of a furnace, when he complained of feeling ill. A physician was sent for and, arriving about an hour later, found him "in a semi-conscious state, frothing at the mouth and stiffening up on one side." He was sent to a hospital and died soon afterwards, and his dependent widow made a claim under the workmen's compensation act. Previous to his death the employee appeared to have been in good health. He had assisted in making repairs on a tank in which chemicals were prepared, having been inside about ten or fifteen minutes on each occasion. There was evidence that on at least two occasions he had been overcome while working in this tank and that at times he had not appeared to be well. The claimant contended that the employee's death was the result of a personal injury due to the inhalation of poisonous fumes from chemicals. The physician who attended him at the factory, also the medical examiner who examined his body and another medical examiner each testified that he was unable to state the cause of death. The arbitration committee found that "the arbitrators are unable to determine what was the cause of [his] death, this being wholly a matter of conjecture, and, therefore, are unable to find that [his] death . . . arose out of his employment." This finding was adopted by the Industrial Accident Board. *Held,* that the finding was warranted.

APPEAL to the Superior Court under St. 1911, c. 751, Part III, § 11, as amended by St. 1912, c. 571, § 14, from a decision of the Industrial Accident Board refusing to award compensation to Mary A. Murphy, the dependent widow of John T. Murphy, who died on March 2, 1913, when in the employ of the O. A. Miller Treeing Machine Company, a corporation maintaining a factory at Quincy called the Old Angier Mills, in which Murphy was employed.

The decision appealed from concluded as follows: "The evidence leaves the matter of the cause of the death of the employee

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in doubt, removes apoplexy or other organic diseases as its probable cause, shows that the employee did not die of asphyxia and does not sustain the claim of the dependent that it arose out of and in the course of the employment by reason of poisoning from the chemicals which were used in the manufacture of moving picture film material. The board, therefore, finds that the weight of the evidence does not show that the employee received a personal injury arising out of and in the course of his employment."

The case was heard by *Fessenden*, J. The evidence reported is described in the opinion. The judge made a decree in accordance with the decision of the Industrial Accident Board; and the dependent widow of the employee appealed.

G. W. Abele, for the dependent widow.

G. Gleason, for the insurer.

CROSBY, J. It is the contention of the claimant that the employee died on March 2, 1913, as the result of a personal injury arising out of and in the course of his employment, — by poisoning from fumes of chemicals used in experimental work at the place where he was employed. He was a carpenter by trade, thirty-five years old, and was employed to help around generally, "doing odd jobs, with no regular hours, subject to call at all times including Sundays and evenings." His employment began about August 19, 1912, and there was evidence that during the early part of the week ending Saturday March 1, 1913, work at the factory was temporarily discontinued; that on the Saturday morning above referred to he went to work as usual, and was told by his employer that after doing certain things that had to be done he could go home and return when necessary to care for the furnaces, as there was nothing else for him to do. The evidence shows that he did not go home afterwards; that the next morning the employer went to the factory about 10:30 o'clock and found Murphy sitting on a box in front of a furnace; that he complained of feeling ill; that a physician was sent for and arrived about 11:20 o'clock; that at that time Murphy "was in a semi-conscious state, frothing at the mouth and stiffening up on one side;" that he was sent to a hospital and died soon afterwards.

The Industrial Accident Board found that "It was shown that the employee had been in good health previous to his death and that he had been engaged to perform carpenter work and help

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his employers to perfect a certain moving picture film. Certain chemicals were used in preparing this film, the testimony showing, however, that these were not dangerous nor was there any risk of suffocation or poisoning from their use or from contact with them. The employee had assisted in making repairs on the tank into which the preparation of chemicals was placed, being inside about ten or fifteen minutes on each occasion." The physician who attended him at the factory testified that he could not state the cause of death. Dr. Magrath, medical examiner for Suffolk County, examined the body on July 7, 1913; he testified he was unable to state the cause of death. And Dr. Jones, medical examiner for the Quincy district, testified to the same effect. The arbitration committee found that "the arbitrators are unable to determine what was the cause of Murphy's death, this being wholly a matter of conjecture, and, therefore, are unable to find that John T. Murphy's death on March 2, 1913, arose out of his employment." This finding has been adopted and affirmed by the board.

To entitle the dependent to the payment of compensation under the workmen's compensation act, it must be found affirmatively that the injury which caused the death of the employee arose out of and in the course of his employment, — the burden rests upon her to prove that fact by a preponderance of evidence. The finding of the board that the injury did not arise out of and in the course of his employment, was a finding upon a question of fact, and cannot be set aside if there was any evidence to support it. *Sponatski's Case*, 220 Mass. 526. *Sanderson's Case*, 224 Mass. 558.

It is true, as the counsel for the claimant argues, that the facts required to establish her claim to compensation under the act need not necessarily be proved by direct evidence, but may be established by reasonable inferences drawn from facts shown to exist. *Von Ette's Case*, 223 Mass. 56, 59, 60. *Sponatski's Case*, *supra*. Although there was evidence that the employee had been overcome on at least two occasions while working in the mixing tank, and that on other occasions during his employment he had complained of feeling ill, and at times had not appeared to be well, still upon all the evidence we cannot say that the Industrial Accident Board was required to find that his death was the result of a personal injury due to the inhalation of poisonous fumes from

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chemicals, as the claimant contends; there was no direct evidence to support that contention and we do not think it reasonably could be inferred that death was the result of that cause. In view of the medical and other testimony, it would seem that the finding of the board that the cause of death was doubtful and could not be determined, was amply justified.

While the widow and children of the deceased are entitled to sympathy, we are constrained to hold that the cause of the employee's death is wholly conjectural and speculative. The contention that it arose out of the employment does not rest on a sound basis in view of the evidence as recited in the record. *Sanderson's Case, supra. Milliken's Case,* 216 Mass. 293. *Marshall* v. *Owners of Steamship Wild Rose,* [1910] A. C. 486. *Barnabas* v. *Bersham Colliery Co.* 3 B. W. C. C. 216.

Because of the conclusion reached, we need not consider whether the dependent's claim for compensation is barred for failure to give the notice required by St. 1911, c. 751, Part II, § 15, nor whether under Part II, § 18, the dependent would be entitled to compensation even if such notice had not been given.

Decree affirmed.

ARAN ZOULALIAN *vs.* NEW ENGLAND SANATORIUM AND BENEVOLENT ASSOCIATION.

Middlesex. March 15, 18, 1918. — May 22, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Charity. Workmen's Compensation Act. Negligence, Employer's liability.

A corporation, incorporated "for the purpose of founding a hospital or charitable asylum . . . for the care and relief of indigent or other sick or infirm persons . . . and in no manner directly or indirectly for private profit or dividend paying, to any one," is a valid public charity.

The provisions of the workmen's compensation act do not apply to a corporation organized for and carrying on a public charity.

In an action for personal injuries by an employee against a corporation organized for and engaged in a work which is a public charity, and which is not a subscriber under the workmen's compensation act, where it appears that the plaintiff was injured upon a buzz planer negligently permitted by the defendant to be operated without a guard, if it also appears that the risk of injury to the plaintiff from that cause was an obvious one which could be seen by reasonable obser-

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vation on his part, he is precluded from recovery either under the employers' liability act or at common law.

The question, *whether* the character of the defendant and of its work would have prevented it from being held liable in any event for its negligence or the negligence of its servants or agents, was not considered.

TORT for personal injuries received by the plaintiff while in the employ of the defendant and at work upon a planer in a carpenter shop which was a part of its plant, the declaration containing three counts, it being alleged in the first count that the injury to the plaintiff was caused by negligence of the defendant in permitting a buzz planer upon which the plaintiff was set to work to become defective and dangerous and the floor about it to be unsafe and dangerous, in the second count that the injury was caused by negligence of a fellow servant of the plaintiff, and in the third count that the injury was caused by negligence of the defendant in setting the plaintiff at work upon a dangerous machine without sufficient instruction and warning. Writ dated August 9, 1915.

The action was tried before *Hitchcock*, J.

It appeared that the purposes for which the defendant was incorporated, as stated in its charter, were "for the purpose of founding a hospital or charitable asylum within the State of Massachusetts, for the care and relief of indigent or other sick or infirm persons, at which institution may be received also patients and patrons who are able to and do pay for the benefits there received, and which institution shall devote the funds and property acquired and received by it from time to time from all sources, exclusively to maintaining itself, improving its condition and facilities, extending its benefits and usefulness, and facilitating and promoting its purposes, by such sanitary, dietetic, hygienic, and philanthropic reforms and efforts as are germane or auxiliary thereto; all of its said purposes being undenominational, unsectarian, philanthropic, humanitarian, charitable and benevolent, and in no manner directly or indirectly for private profit or dividend paying, to any one."

The defendant was not a subscriber under the provisions of the workmen's compensation act. The material evidence is described in the opinion.

At the close of the evidence the plaintiff asked the judge to rule as follows: "If the large part of the beds or rooms used for

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patients by the defendant corporation are intended to be let for adequate return the jury might find that the defendant was not a public charitable corporation." The ruling was refused.

The judge submitted special questions to the jury, which, with the jury's answers, were as follows:

"1. Was the defendant negligent in setting the plaintiff at work on a dangerous machine without giving him suitable warnings and instructions?" The jury answered, "Yes."

"2. Was there a guard furnished with the planer which the plaintiff was operating at the time of his injury, and attached thereto, so that the plaintiff could have used it if he so desired?" The jury answered, "No."

"3. Was the buzz planer upon which the plaintiff was working a dangerous machine to operate without a guard to prevent the hand of the plaintiff from coming in contact with the knives?" The jury answered, "Yes."

"4. Was the danger in operating a buzz planer without a guard an obvious danger, that could be seen by reasonable observation on the part of the plaintiff?" The jury answered, "Yes."

"5. Did the general manager, treasurer and director of the defendant corporation know that the buzz planer was being used without a guard, and did he intend or direct that it should be used by the plaintiff without a guard?" The jury answered, "Yes."

"6. Did Alexandian [the fellow servant of the plaintiff referred to in the second count of the declaration] have hold of the board which the plaintiff was planing, and was he negligent in reference thereto, so as to cause the injury to the plaintiff?" The jury answered, "Yes."

"7. What damage should be awarded to the plaintiff, if he is entitled to recover?" The jury answered, "$2,500."

The judge thereupon ordered a verdict for the defendant on the ground that it was a public charity and therefore "not liable for the negligence of its servants or agents in matters of this kind." The plaintiff alleged exceptions.

G. P. Beckford, for the plaintiff.

O. Storer, for the defendant.

CROSBY, J. This is an action for personal injuries received by the plaintiff while in the employ of the defendant and at work on a buzz planer.

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The defendant is a corporation organized "for the purpose of founding a hospital or charitable asylum . . . for the care and relief of indigent or other sick or infirm persons . . . and in no manner directly or indirectly for private profit or dividend paying, to any one." It is plain that the objects of the corporation being benevolent and charitable, it must be held to be a valid public charity. *Conklin* v. *John Howard Industrial Home*, 224 Mass. 222. *Thornton* v. *Franklin Square House*, 200 Mass. 465. *Farrigan* v. *Pevear*, 193 Mass. 147, and cases cited. In *New England Sanitarium* v. *Stoneham*, 205 Mass. 335, it was held that the defendant in the case at bar was a charitable corporation and as such was exempt from taxation under R. L. c. 12, § 5, cl. 3.

It is the contention of the plaintiff that the defendant is within the provisions of the workmen's compensation act (St. 1911, c. 751, and acts in amendment thereof); but we are unable to agree with this contention. While it is provided by § 2 of Part I, that "The provisions of section one shall not apply to actions to recover damages for personal injuries sustained by domestic servants and farm laborers," it does not follow that all other employees who may be injured in the course of their employment are within the terms of the act. Undoubtedly the rules of law declared by this court relating to persons injured while in the employ of charitable institutions may be changed by the Legislature, still that such change was made by the workmen's compensation act is not to be inferred in the absence of a plain intention on the part of the Legislature to that effect.

It has often been held that certain persons or classes of persons are excepted by implication out of a statute expressed in general words, the rule being that where the words of a law in their common and ordinary significance are sufficient to include such persons or classes of persons "'the virtual exception must be drawn from the intention of the Legislature, manifested by other parts of the law; from the general purpose and design of the law; and from the subject matter of it.'" *Bradford* v. *French*, 110 Mass. 365, 367. *McCall* v. *Parker*, 13 Met. 372, 381.

It never has been held in this Commonwealth that a charitable institution was liable for negligence; on the other hand, it has been expressly held that such institutions are not liable for the

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negligence of their servants or agents. *McDonald* v. *Massachusetts General Hospital*, 120 Mass. 432. *Farrigan* v. *Pevear*, *supra*, and cases cited.

In *Commonwealth* v. *Rumford Chemical Works*, 16 Gray, 231, at page 232, this court said: "But it is never to be presumed that the Legislature intended to make any innovations upon the common law further than is absolutely required upon a just interpretation of the provisions of its positive enactments. And this, it is said by Chancellor Kent, has been the language of the courts in every age. 1 Kent Com. (6th ed.) 464. In the decisions of our own, it has often been recognized as an established rule that a statute is not to be construed as a repeal of the common law unless the intent to alter it is clearly expressed."

For many years before the enactment of St. 1911, c. 751, this court in numerous decisions had uniformly held that a charitable institution was not liable for personal injuries due to the negligence of its servants or agents; and it is to be assumed that the Legislature had the existing law in mind when the statute was passed. We are of opinion that, considering the statute as a whole, together with its manifest purpose and the objects sought to be accomplished by it, it was not intended thereby to change the law as it previously stood and include employees of charitable institutions. *Hyde* v. *Gannett*, 175 Mass. 177. The cases cited by the plaintiff were decided under the English workmen's compensation act and cannot affect the question whether St. 1911, c. 751, applies to a valid public charity.

The presiding judge submitted to the jury certain questions to be answered by them, the fourth of which was as follows: "Was the danger in operating a buzz planer without a guard an obvious danger, that could be seen by reasonable observation on the part of the plaintiff?" The answer was in the affirmative. This finding makes it plain that the plaintiff is precluded from recovery, either under the employers' liability act or at common law, apart from the fact that the defendant is a charitable corporation. As the jury have found that the danger of operating the planer without a guard was obvious and could be seen by reasonable observation on the part of the plaintiff, he must be held to have assumed the risk, even though he was unable to speak or understand the English language and was inexperienced. It is clear that any in-

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structions or warning of the danger would not have informed him of anything which was not plainly to be seen; and he was a carpenter, and there is nothing in the record to show that he was not a man of average intelligence. *Chmiel* v. *Thorndike Co.* 182 Mass. 112. *Sullivan* v. *Simplex Electrical Co.* 178 Mass. 35. *Robinska* v. *Lyman Mills,* 174 Mass. 432. *Stuart* v. *West End Street Railway,* 163 Mass. 391.

Although the plaintiff is not entitled to recover for the reasons previously stated, we do not mean to intimate that the defendant could be held liable for its negligence, or for the negligence of its servants or agents, — these questions need not be considered in view of the conclusions reached.

Exceptions overruled.

ARTHUR J. WELLINGTON *vs.* DENNIS F. CROWLEY & trustee.

Suffolk. April 8, 1918. — May 22, 1918.

Present: RUGG, C. J., LORING, DE COURCY, PIERCE, & CARROLL, JJ.

Contract, Construction, Performance and breach. *Words,* "Suitable location."

In an action by the proprietor of a stone crusher on a contract in writing, by which the defendant agreed to pay at a certain rate for the crushing of stone by the plaintiff, the plaintiff agreed to furnish a stone crushing plant and the defendant agreed "to furnish a suitable location for the crusher," it appeared that the defendant furnished a location on which the plaintiff set up his crusher, but that, before the beginning of the crushing operations, an injunction was issued in a suit brought by persons living in the vicinity of the location prohibiting the operation of the crusher as a nuisance, so that the plaintiff was unable to operate the crusher and earn the payments that would have been due to him under the contract. *Held,* that the defendant had broken the contract and the plaintiff was entitled to damages, because a location that could not be used without violating the rights of those living in the neighborhood was not a "suitable" one within the meaning of the contract.

CONTRACT, by a person carrying on business individually under the name Massachusetts Broken Stone Company, upon a contract in writing dated April 6, 1904, which is printed below, whereby the plaintiff agreed to furnish a stone crushing plant and the defendant agreed "to furnish a suitable location for the crusher," and whereunder the plaintiff was to crush for the defendant stone guaranteed to be not less than eight thousand tons and to receive payment there-

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for on the fifteenth of each month for all stone crushed up to the first of the month until the completion of the work, alleging that the defendant failed to furnish a suitable location for the crusher, whereby the plaintiff, who was ready and willing to perform his part of the contract, was prevented from performing it and from earning the agreed payments. Writ dated November 24, 1905.

The contract sued upon was as follows:

"Boston, April 6, 1904.

"D. F. Crowley, Esq.,
W. Quincy, Mass.

"Dear Sir: In regard to furnishing a stone crushing plant and crushing stone for you at Harrison Square, would make you the following proposition. Will furnish a complete crushing plant with pockets for loading stone into carts and set up the plant on the location to be furnished by you, furnish engineer, fuel and men to feed the stone from the crusher platform into the crusher, and crush and deliver 80 to 100 tons of stone per day into the bins for 25 cts. per ton of 2,000 lbs.

"You to furnish a suitable location for the crusher, with water supply, and furnish daily 80 to 100 tons of stone of suitable size to enter the crusher delivered on the crusher platform, and remove the crushed stone from the bins as fast as crushed. We to be paid on the 15th of each month for all stone crushed up to the first of the month, and you to guarantee not less than 8,000 tons and a continuous supply of stone at the above named rates until the completion of the work.

Yours truly,

"Accepted, Mass. Broken Stone Company
Dennis F. Crowley. By B. P. Ellison."

The case was referred to an auditor, who filed a report, upon which as the only evidence the case afterwards was heard by *Wait*, J. The auditor's report, among other findings, contained the following:

"The defendant furnished a location for the plant in the vicinity of the place where a large quantity of stone had been collected on Topliff Street, and it appears that the plaintiff caused a crushing plant to be transported to the location so furnished and there set up ready for operation.

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"Just prior to the beginning of the crushing operations, an injunction, restraining the plaintiff from there operating the plant, was obtained upon the petition of the residents living in the vicinity of the location of the plant, on the ground that said crushing operations would be a nuisance, and as a result of said injunction, the plaintiff was unable to operate the plant upon the location furnished."

The auditor's report concluded as follows:

"The question, therefore, turns wholly upon the legal construction of the word 'suitable' as used in this contract. If it be held to relate solely to the suitability of the location from an operating standpoint only, then I find that there has been no breach of the contract. If, however, its legal construction and significance is broader than that and that the suitability of the location as required and intended by the contract fairly implies such a location as will be suitable not merely from an operating standpoint, but also with reference to the neighborhood and with references to surrounding conditions and circumstances, then I find that a location of that description was not furnished and there consequently has been a breach of the contract.

"If there has been a breach of the contract in that a location of the character required was not furnished by the defendant, then I find that the plaintiff is entitled to damages in the sum of $968 and interest from the date of the writ."

The judge, without hearing either party in argument, found and ordered judgment for the defendant, and upon the request of both parties reported the case for determination by this court. If his finding was wrong, judgment was to be entered for the plaintiff in the sum of $968, with interest from the date of the writ; otherwise, judgment was to be entered on the finding for the defendant.

The case was submitted on briefs.

W. A. Knowlton & F. M. Hill, for the plaintiff.

H. V. Cunningham, for the defendant.

LORING, J. It is expressly provided in the contract between the plaintiff and the defendant that the defendant was "to furnish a suitable location for the crusher." If the "location for the crusher" furnished by the defendant was a location where stone could not be crushed, it was not a "suitable location" within the true meaning of this provision of the contract. The reason why

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stone could not be crushed at the location furnished by the defendant (if stone could not be crushed there) is of no consequence. If stone could not be crushed at the location furnished by the defendant because crushing stone there was a violation of the rights of those living in the neighborhood, the location was no more a "suitable" one than is a location where for physical reasons the work of crushing stone could not be carried on. See in this connection *Evans* v. *Reading Chemical Fertilizing Co. Ltd.* 160 Penn. St. 209, 227; *Susquehanna Fertilizer Co.* v. *Spangler*, 86 Md. 562, 571; *Teilman* v. *Plock*, 21 Fed. Rep. 349, 350.

If the action taken by the neighbors had been taken after the plaintiff had begun work at the location furnished by the defendant, questions would have arisen not presented by this record. It is stated in the report that the injunction forbidding the crushing of stone at the location furnished by the defendant was granted "just prior to the beginning of the crushing operations."

So too, if it had appeared on the record that part of the damages found by the auditor included work done before the action was taken by the neighbors, a question would have arisen which has not been argued by the defendant. The report does not state how the damages (amounting to $968) found by the auditor were computed, and the defendant has confined his argument to the true meaning of the provision of the contract requiring the defendant to provide "a suitable location for the crusher." The presiding judge ends his report with these words: "If my finding was wrong, then judgment is to be entered for the plaintiff in the sum of $968, with interest from the date of the writ." The finding was wrong. It follows that judgment is to be entered for the plaintiff in the sum just stated, and it is

So ordered.

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HENRY W. SAVAGE, INCORPORATED, *vs.* CHARLES H. WHEELOCK & another.

Suffolk. April 8, 1918.—May 22, 1918.

Present: RUGG, C. J., LORING, DE COURCY, CROSBY, & PIERCE, JJ.

Contract, Implied in law. *Deceit. Fraud. Conspiracy. Agency*, Broker's commission.

An action of contract for money had and received cannot be maintained against two defendants jointly to recover money received to the plaintiff's use by only one of them.

In an action of tort by a real estate broker against a real estate dealer and another real estate broker, charging the defendants with having conspired to procure through fraud the payment to the defendant broker of a commission on the purchase of a house by the defendant real estate dealer that really had been earned by the plaintiff but had been relinquished by him induced by the fraud of the defendants, there was evidence on which it could have been found that the plaintiff, having been employed by the owner of the house to sell it, offered it to the defendant real estate dealer at a certain price, and that the defendant dealer declined to buy it at that price and then asked the defendant broker to get the house for him at the lowest price possible, that the defendant broker then went to the owner and told him that he could sell the house for him if he would employ him as his broker, which the owner did, agreeing to pay him a certain commission on the sale, that the defendant dealer told the defendant broker to conceal his name in the transaction and the broker deceitfully prevented the owner and the plaintiff from discovering that the defendant broker represented the defendant dealer who had declined the offer made through the plaintiff, that the plaintiff, believing that the defendant broker represented another purchaser, wrote to the owner stating that he should not ask the owner to pay him a commission in case the owner sold the house to the defendant broker's customer, that the house then was sold through the defendant broker for the same price at which it originally had been offered by the plaintiff to the defendant dealer, who paid no commission, and who had reason to infer that the defendant broker was paid by the owner, although he had been employed by the defendant dealer to buy the house for him at the lowest possible price. *Held*, that there was evidence for the jury of a joint tort committed by the defendants, whereby the plaintiff was deceived into the belief that a new customer had been procured and was induced to relinquish the collection from the owner of the commission on the sale of the house to which he lawfully was entitled.

In the same case it was *held* that on the facts disclosed it could not be said as matter of law that the plaintiff did not make the investigation that he ought to have made in failing to ask the defendant dealer or the defendant broker, or both of them, who the defendant broker's customer was.

TORT OR CONTRACT, by a corporation engaged in business as a real estate broker, against Charles H. Wheelock, another real

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estate broker who had no office and was not a member of the real estate exchange, and Henry S. Moody, a real estate dealer engaged in the business of buying and selling real estate, to recover the amount of a commission upon a sale of the house and land of one Mrs. Glazier, numbered 772 on Washington Street in Brookline, which the plaintiff was prevented from collecting by the wrongful and fraudulent acts and deceits of the defendants, the declaration, besides two counts in tort, also containing a third count for $625 as money had and received by the defendants to the plaintiff's use. Writ dated July 30, 1915.

In the Superior Court the case was tried before *White*, J. The evidence is described in the opinion. At the close of the evidence the defendant Moody and the defendant Wheelock each filed a motion asking the judge to order a verdict in his favor. The judge denied these motions and submitted the case to the jury, who returned a verdict against both defendants in the sum of $1,000, of which by order of the judge the plaintiff remitted all in excess of $625. The defendants alleged exceptions.

The case was submitted on briefs.

J. H. Devine, for the defendant Wheelock.

I. C. Hersey, J. F. Warren & E. H. Palmer, for the defendant Moody.

H. G. Allen, W. P. Meehan & C. H. Donahue, for the plaintiff.

LORING, J. The defendant Moody, wishing to buy a house owned by a Mrs. Glazier for less than it was offered to him by the plaintiff corporation (which had it for sale for the owner), asked the defendant Wheelock (a real estate broker who had no office but did business at the house where he lived) to get the house for him for the lowest price at which it could be bought. Thereupon Wheelock saw Mrs. Glazier's son (who acted for his mother throughout) and told him that he could sell the house for him if he would employ him as his broker. While Wheelock was still in his office at that time Glazier (the son) called up the plaintiff on the telephone in Wheelock's presence and had a conversation with one of its officers. This conversation will be stated later on. Glazier then employed Wheelock to sell the house as broker for his mother. After some offers back and forth, made through Wheelock, the house was sold to Moody for the price at which it was offered to him by the plaintiff. When Moody first spoke to

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Wheelock he told him not to surrender his name and the contract was made between Mrs. Glazier (acting through her son) and Wheelock. It was provided in the contract that a commission of two and one half per cent (being the usual commission in such a case) should be paid by Mrs. Glazier to Wheelock. The contract was signed on April 6, 1915; on April 13 the papers were passed and the commission was paid by Mrs. Glazier to Wheelock and on that day Mrs. Glazier conveyed the house to Wheelock and Wheelock conveyed it to Moody. Later on the plaintiff found out that Wheelock's customer and its customer were one and the same person. Upon finding out that fact and the fact that the house had been sold through Wheelock for the price at which it had been offered to Moody by it, the plaintiff brought this action to recover the commission paid Wheelock on the ground that the commission had been earned by it and wrongfully paid to Wheelock. At the trial each of the defendants asked the judge to direct the jury to return a verdict for him, and the case is here on exceptions taken to his refusal to do so. No exception was taken to the charge and the record does not disclose what the charge of the presiding judge was.

The plaintiff has placed great reliance upon *Gormley* v. *Dangel*, 214 Mass. 5. That case is an authority for the plaintiff to some extent, but it does not go as far as we are asked to go in the case at bar. In that case a broker who had earned a commission brought an action for money had and received against one who through fraud had induced the owner to pay the commission to him on the ground that he (the defendant) had earned it. It was held that he could recover. There is a count for money had and received in the case at bar. But the action in the case at bar is brought against Moody and Wheelock jointly and there was no evidence that any part of the commission ever came into Moody's possession. The fact that the money was received by one defendant only is fatal to the plaintiff's right to maintain a count for money had and received in an action brought against the defendants jointly.

But besides the count for money had and received the declaration contained two counts in tort. They were in effect counts charging the defendants with having conspired to procure through fraud the payment to Wheelock of the commission earned by the

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plaintiff. The requests for rulings were not based upon the pleadings. The question on the counts in tort therefore is whether on the evidence the jury were warranted in finding that Moody and Wheelock conspired together to secure the payment to Wheelock of the commission earned by the plaintiff without regard to the particular allegations contained in these counts.

A case of fraud on Wheelock's part was made out by his own testimony supplemented by the contract with Glazier signed by him with his own hand. Wheelock testified that: "In dealing with Mr. Glazier he [Wheelock] endeavored to get the property for Moody as cheaply as possible." At the same time he (Wheelock) asked Glazier to employ him as his (Glazier's) broker and in answer to the question, "You wanted Mr. Glazier to understand you would use your best efforts to get the best price you could for his property?" he answered, "The best terms, yes, sir." In and by the contract signed by Wheelock it was provided that Mrs. Glazier should pay Wheelock a commission; as matter of construction that meant that she should pay him a commission as her broker. That made out a case against Wheelock of receiving a commission which he knew he had not earned. That is to say, a case of fraud on Mrs. Glazier was made out by the evidence just stated.

Whether a case of fraud on the plaintiff was also made out in evidence is another and further question. Wheelock now contends that in competition with the plaintiff he had a right to earn a commission if he induced Moody to pay more for the house than the plaintiff induced him to pay for it. But that was not Wheelock's position when (in the conversation we have referred to) a representative of the plaintiff was asked by telephone a question by Glazier in Wheelock's presence to find out whether the plaintiff's customer and Wheelock's customer were one and the same person. The circumstances attending this conversation were these: When Wheelock first called on Glazier, Glazier in Wheelock's presence called up the plaintiff on the telephone and told the plaintiff's representative who answered the telephone (Stimpson by name) that he had a customer for the house and he asked him (Stimpson) what his (Glazier's) position would be with regard to a commission to the plaintiff if he (Glazier) sold the house. To this Stimpson answered that if Glazier found a purchaser himself he was not

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certain "that the plaintiff could claim a commission." It is to be assumed that this answer was not heard by Wheelock. To this Glazier said (and this Wheelock did hear): "This man is not a customer, he is a broker, but he won't disclose his principal's name;" Glazier (still in Wheelock's presence) then asked Stimpson what his customer's name was. Stimpson said "Powers." Then Glazier asked Wheelock if his customer's name was Powers. And he (Wheelock) said: "He would say that much, that this man's name was not Powers." By reason of a fact not known to Glazier this was an evasive answer and one which the jury were warranted in finding was intended to deceive the plaintiff. On this answer being given by Wheelock, Glazier (still speaking on the telephone) said to the plaintiff: "That is not this broker's client." The fact which made this answer an evasive answer intended to deceive the plaintiff was that, when Moody first saw Wheelock and asked him to get the house for him as cheaply as he could, he (Moody) told Wheelock that he was buying the house for his daughter Mrs. Powers. Wheelock's answer was not that the plaintiff's customer and his were different persons. He had every reason to suppose that they were one and the same person. Wheelock knew that the house was being bought by his customer for Mrs. Powers. His answer was as just stated: "He would say that much, that the man's name was not Powers." And Wheelock's position was not the innocent position which he now asserts that he had a right to take, namely, to earn a commission by getting a better price for the house than the plaintiff succeeded in getting although he got that price from the person who had applied in the first instance to the plaintiff. He told a half truth often more misleading than a whole lie. The position he then took or could have been found by the jury to have taken was: "I want you to believe that my customer is not the person that the plaintiff has secured as a possible customer and for that reason I shall be and the plaintiff will not be entitled to a commission if you sell to my man no matter what price I succeed in getting him to give." If the jury did find that, they would have found in effect that Wheelock intended to commit a fraud on the plaintiff as well as a fraud on Glazier. We are of opinion that on the evidence a case of fraud on the plaintiff was made out so far as Wheelock was concerned.

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We come now to the case against Moody. If Moody knew that Wheelock had been employed by Glazier and was to receive a commission from his (Glazier's) mother although he was really acting for him (Moody) the jury were warranted in finding that Moody intended to get Wheelock's services in his (Moody's) interest and have Wheelock paid for so doing by Glazier's paying to Wheelock the commission due the plaintiff if he (Moody) bought the house for the price at which it was offered to him by the plaintiff. There is no direct testimony that Moody knew that at Wheelock's request Glazier had employed him as Mrs. Glazier's broker. But the circumstances in evidence warranted the jury in finding that he knew that fact. And the fact of a conspiracy is one of the facts which are rarely if ever proved by any but circumstantial evidence. The circumstances in evidence were these: Moody was a dealer in real estate of many years' standing; he knew that the trade had gone through, that he had received title to the house and that Wheelock had not asked him for a commission. The jury were warranted in finding that Moody knew that Wheelock did not work without pay and from that and the other facts in evidence that he got his pay from Glazier and that to this Moody made no objection. In addition Moody is at least *prima facie* chargeable with knowledge of the contents of the contract signed by Wheelock for him as undisclosed principal by which Glazier agreed to pay Wheelock a commission. It is to be borne in mind also that Moody told Wheelock not to disclose the fact that he was his principal and that when he accepted the offer which he did accept on its being brought to him by Wheelock he knew that he was accepting the same offer (or substantially the same offer) that was made to him by the plaintiff and refused by him at that time. And finally when Moody first called on the plaintiff as the broker who had the house for sale he passed himself off (or at least the jury could so find) as a man by the name of Powers and the only address given by him to the plaintiff was the number of a telephone in a house in Milton where his former wife and his daughter Mrs. Powers lived although he was and had been for years a dealer in real estate with an office in Boston. Lastly Moody lied (or rather the jury were warranted in finding that he lied) as to his relations with Wheelock. Moody testified that: "He first met Wheelock

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about two months before March, 1915." Wheelock testified "that he first met Moody fifteen years ago."

In addition it appeared in evidence that on April 6 the plaintiff wrote Glazier a letter, and later on before the papers were passed one of the plaintiff corporation's officers told Glazier that, inasmuch as they were acting on suspicion but did not know that their customer and Wheelock's were one and the same person, they should not ask Mrs. Glazier to pay a commission to them in case a sale was made to Wheelock's customer, and that they then said that they took this course of action because they did not want to stand in the way of Mrs. Glazier making a sale of the house.

We are of opinion that on the evidence the jury were warranted in finding that the defendants conspired fraudulently to represent to the plaintiff that Wheelock's customer was not the plaintiff's customer, knowing that representation to be false, and that the plaintiff relying on that representation waived its right to collect from Mrs. Glazier the commission in fact earned by it when she sold her house to Moody for a price at which it had been offered to him by the plaintiff. That is to say, the case at bar comes within that class of cases where the existence of a conspiracy is important as proof that the tort which was committed was a joint tort as was said of the case then before the court in *Bilafsky* v. *Conveyancers Title Ins. Co.* 192 Mass. 504, 506. It is not necessary to consider the broader doctrine that an action of tort lies whenever two or more persons conspire to do an unlawful act or a lawful act by unlawful means to the prejudice of the plaintiff. For this authority is to be found in *O'Callaghan* v. *Cronan*, 121 Mass. 114, 115, *Cook* v. *Brown*, 125 Mass. 503, *Garst* v. *Charles*, 187 Mass. 144, *Spaulding* v. *Knight*, 116 Mass. 148, *Revere Water Co.* v. *Winthrop*, 192 Mass. 455, 458, *DeWolfe* v. *Roberts*, 229 Mass. 410; and cases there collected. But there is some conflict on the point at least in what is said in some of the opinions of this court. See *New England Foundation Co.* v. *Reed*, 209 Mass. 556, 560; *Parker* v. *Huntington*, 2 Gray, 124; *Livermore* v. *Herschell*, 3 Pick. 33.

The first contention of the defendants in answer to this case is that the plaintiff voluntarily released Mrs. Glazier from her obligation to pay the plaintiff a commission and so is estopped to claim the commission paid by her to Wheelock. That is not inconsistent with the present proceeding. On the contrary it is the

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gravamen of the action now before us. The gravamen of the action now before us is that the plaintiff was induced to forego collecting from Mrs. Glazier the commission in fact earned by it in reliance upon the defendants' false and fraudulent representation that Wheelock's customer was a different person from the customer procured by it.

The next contention made by the defendants in answer to this case is that, if the plaintiff had made the inquiries it ought to have made it would have learned that "Powers" and Moody were one and the same person and that person was Wheelock's customer. We assume that the defendants rely on the doctrine stated in *Rollins* v. *Quimby*, 200 Mass. 162, *Thomson* v. *Pentecost*, 206 Mass. 505, *Forbes* v. *Thorpe*, 209 Mass. 570, *Townsend* v. *Niles*, 210 Mass. 524, *Noyes* v. *Meharry*, 213 Mass. 598, and cases there collected and cited. If the plaintiff's officer who saw "Powers" had called upon Moody he would have seen that Moody and "Powers" were one and the same person. But that would not have brought to his knowledge the fact that that person was Wheelock's customer. In considering whether the plaintiff did or did not make the investigation it ought to have made, the matter must be looked at as it presented itself to the plaintiff at the time. In the first place the plaintiff had asked Mr. Glazier to ask Wheelock if his customer's name was Powers and it had been told by Glazier that Wheelock said that his customer's name was not Powers. The plaintiff also had been told by Glazier that Wheelock's customer had instructed him (Wheelock) not to disclose his name. It cannot be said under these circumstances that as matter of law the plaintiff did not make the investigation it ought to have made in that it did not call on Moody or Wheelock or both and ask them who Wheelock's customer was.

The terms of the sale actually made to Moody differed in minor details from those contained in the offer made to Moody through the plaintiff. The two were in substance the same. No argument in this connection has been made by the defendants. For that reason it is not necessary to go into the matter further.

We have found nothing in the cases cited by the defendants which requires notice.

Exceptions overruled.

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KEHLOR FLOUR MILLS COMPANY vs. LINDEN & others, & trustees.

Suffolk. November 19, 1917. — May 23, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Contract, What constitutes, Construction, Performance and breach. *Evidence*, Matters of common knowledge.

Where an alleged contract for the sale of goods was made, if at all, wholly by letters, telegrams and cablegrams, in which no ambiguous words or terms were employed, and where the circumstances under which the correspondence took place are not in controversy, the question whether a contract was made is one of law for the court.

In such a case, in order that there should be a contract, the writings taken together must be so plain in their meaning and effect as not to be open to any reasonable misunderstanding.

An unwarranted mistake by one of the parties to a contract in writing as to the meaning of the contract is no excuse for a breach of the contract by him due to such unreasonable misunderstanding.

Ordinarily the annexing of a condition to the acceptance of an offer is regarded as the rejection of the original offer and the making of a new counter offer, which will become a contract only upon acceptance in accordance with its terms.

In interpreting a correspondence between a manufacturing corporation in this country through its agent in Norway and a firm of merchants in Sweden, which took place a few weeks after the outbreak of the great war, it was *said* that in general the court will take judicial notice of the disturbance of commercial relations between neutral countries dependent upon navigation in the zone affected by that war.

In an action by a manufacturer of flour doing business in the United States and having an agent in Norway against the members of a firm of merchants in Sweden, for the breach of a contract to purchase from the plaintiff forty thousand sacks of flour alleged to have been made by a correspondence by letter, telegraph and cable which took place within a few weeks after the outbreak of the great war, it appeared that the defendants in Sweden telegraphed to the plaintiff's agent in Norway on September 10, 1914, "Offer firm against reply here within Saturday September twelfth further forty thousand sacks Rex patent same price and terms. Shipment on call September October confirm by wire soonest possible." The words "same price and terms" referred to a contract between the parties made a few days earlier, and there was no dispute that the price was $6.90 per two hundred and twenty pounds and that a payment of $276,000 in United States currency was to be deposited immediately by cablegram with certain bankers in New York, who were to "pay this amount to sellers against Through-Bills of Lading issued," and that the credit with the New York bankers "was not to be withdrawn and not to be cancelled." The answer of the plaintiff's agent was not sent until September 13 and was not received by the defendants until September 14. It was as follows: "We confirm sale addi-

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tional forty thousand Rex hundred kilos cottons [to the defendants] six dollars and ninety cents free on board Boston cash New York. . . . Arrange immediately confirmed credit two hundred and seventy six thousand dollars [naming the New York bankers]." On September 14 the defendants telegraphed to the plaintiff's agent, "Confirm we bought further 40 thousand sacks Rex per Canton and further two thousand Sovereign same price and terms as previously Sovereign shipment September Scandinavian tonnage subject to depositing equivalent amount" of Swedish kronas with a certain bank in Sweden "until dollars available confirm by wire." The plaintiff's agent replied by telegram, "We confirm having wired [the plaintiff] yesterday that for the further forty thousand Rex bought by you per steamer Canton end October from Boston at price and terms as former lot equivalent amount in kronas will be deposited with [the Swedish bank] until dollars available for same." The terms last named were confirmed by letter, telegraph and cable. The defendants failed to make the required deposit in kronas in the Swedish bank and the plaintiff brought an action for damages. *Held*, that the reply of the plaintiff's agent to the defendants' first telegram of September 10, did not make a contract because it was not sent until a day after the required time and was not received until the day after that; that the defendants' second telegram of September 14 contained the original offer with the new condition of the deposit of kronas in the bank in Sweden until dollars were available for the deposit in New York, and that the offer thus modified was accepted by the plaintiff, making a contract, which the defendants broke when they failed to make the required deposit in the bank in Sweden.

Where one of the parties to an executory contract clearly breaks his agreement, rendering performance by the other party impracticable, the right of such other party to indemnity by an action for damages at once accrues, and he is not obliged to wait before bringing his action until the arrival of the time when, if there had been no breach, both parties would have performed their obligations fully.

CONTRACT, by a corporation engaged in the business of manufacturing and selling flour with its office at St. Louis in the State of Missouri and its mills at East St. Louis in the State of Illinois, against the members of a firm of merchants doing business at Gothenberg in Sweden, and against certain corporations and partnerships as trustees under the trustee process, to recover damages alleged to have been caused by the breach of a contract in writing, made by correspondence, to purchase certain flour from the plaintiff at an agreed price as stated in the opinion. Writ dated October 13, 1914.

In the Superior Court the case was tried before *Fessenden*, J. The evidence is described in the opinion.

At the close of the evidence, after hearing the counsel for the parties, the judge ruled that under the pleadings and the evidence the question as to whether there was a contract made between the parties must be found upon the written correspondence, letters

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and telegrams in the case, and that, therefore, it was a question of law to be decided by the court, and not a question of fact to be left to the jury, and stated that, as the trial had occupied several weeks, and as it was highly desirable that all the facts in the case should be found fully, he should submit the question of damages to the jury, so as to avoid, if possible, another trial of the case.

The parties thereupon made the following stipulations:

"It is stipulated that, if the court rules that there was a contract and that it was broken by the defendants, the plaintiff would be entitled to damages represented by the difference of the cost of production and delivery of the flour in question on the wharf at Boston and the flour at the rate of $6.90 a sack of two hundred and twenty pounds, this difference being $31,400.

"If the court rules that there was a contract and that it was broken by the defendants and that the breach shall be determined as of October 9, 1914, or October 10, 1914, then that there should be added as damages the further sum of $10,175, together with the further sum of $833.84, which is one half of the plaintiff's claim for loss that it would have derived from the saving of one and one half pounds of flour per sack due to the weight of empty sacks.

"It is further stipulated that, if the court shall rule that there was a contract and that the contract was broken by the defendants but that the defendants were entitled to have the damages assessed as of November 7, 1914, or of October 31, 1914, then the defendants shall be entitled to the benefit of the evidence in the case as to the market price of wheat in the period between October 9, 1914, and the other dates above mentioned; and it is agreed in this event that the average price of the wheat during that period was $1.11. In this case it is understood that a ruling to the effect last above stated would eliminate the item of $10,175 as an item of damage against the defendants.

"Interest at the statutory rate from October 13, 1914, is to be added to the verdict, if any, for which the plaintiff is entitled to have judgment ordered."

The judge then submitted the question of damages to the jury and instructed the jury to find as follows, the same to be subject to the above stipulations, which finding they accordingly returned as their verdict upon the damages, subject to the stipulations aforesaid:

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"Amount of damages, if the contract claimed by the plaintiff was made by the parties, and the defendant committed a breach thereon, October 9 or 10, 1914, to wit: $42,408.84."

Thereupon the judge ordered the jury to return a verdict for the defendants, which accordingly was done, and with the consent of both parties the judge reported the case for determination by this court upon these conditions: If the judge's last ruling was right, there should be entered a final judgment in favor of the defendants; and, if it was wrong, there should be entered a final judgment in favor of the plaintiff for the amount found by the jury as damages or a lesser amount, provided this court should so decide upon the stipulation in regard thereto; or, if the judge was in error in not submitting the case to the jury on the question of whether there was evidence of fact for their consideration, as contended by the plaintiff, then for such action as this court might direct.

For convenience in the report of this case the word "krona" is treated as an English word and its plural is printed "kronas" instead of "kronor." See Murray's New English Dictionary.

C. E. Rushmore (of New York) *& Lee M. Friedman*, for the defendants.

B. S. Elliott (of Missouri) *& W. B. Grant*, for the plaintiff.

RUGG, C. J. This is an action to recover damages for breach of an alleged contract. At the time of the transactions here in issue, the plaintiff was a corporation engaged in the manufacture and sale of flour at St. Louis in the State of Missouri. The plaintiff employed as its agents respecting trade in Sweden and Norway, Noremberg and Belsheim of Christiania in Norway, who hereafter for convenience will be referred to as the agents. The defendants were purchasers of flour in Gothenberg in Sweden. The important point to be decided is whether a contract was made between the parties for the sale by the plaintiff and the purchase by the defendants of a quantity of flour.

The material negotiations on that subject were all by letter, telegraph or cable. Being thus in writing and no ambiguous words or terms being employed, and the circumstances not being in controversy, the question whether a contract was made is one of law and not of fact. *Ellis* v. *Block*, 187 Mass. 408, 411, 412. *Goldstein* v. *D'Arcy*, 201 Mass. 312, 317. The writings taken

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together must be so plain in their meaning and effect as not to be open to reasonable misunderstanding, in order that there be a contract. If they are thus plain, it is of no avail for either party to say that they were not understood. *Wheaton Building & Lumber Co.* v. *Boston*, 204 Mass. 218, 224–226.

The transactions consisted of offers made by the defendants to purchase flour of the plaintiff and replies made by the plaintiff or its agents to these offers. An offer made by one party must be accepted without qualification, or, if any variation from that offer is made by the accepting party, that variation in turn must be unequivocally adopted by the party making the first offer, before a contract can be made. Ordinarily the annexing of a condition to the acceptance of an offer is regarded as the rejection of the original offer and the making of a new counter offer. Such counter offer must be accepted without departure from its terms or there is no contract. *Putnam* v. *Grace*, 161 Mass. 237, 245. *Harlow* v. *Curtis*, 121 Mass. 320. *Minneapolis & St. Louis Railway* v. *Columbus Rolling Mill*, 119 U. S. 149.

The written intercourse here in issue took place within a few weeks after the outbreak of the great war. In general, the court will take judicial notice of the disturbance of commercial relations thereby caused between neutral countries dependent upon navigation in the zone affected by that war. *Underhill* v. *Hernandez*, 168 U. S. 250, 253.

The first communication was a telegram of September 10, 1914, from the defendants to the agents, in these words: "Offer firm against reply here within Saturday September twelfth further forty thousand sacks Rex patent same price and terms. Shipment on call September October confirm by wire soonest possible." The words "same price and terms" refer confessedly to a contract in writing between the parties made a few days earlier, not otherwise here material except for the purpose of fixing price and terms. It is conceded that these elements, fixed thus by reference to the earlier contract, were a price of "Dollars 6.90 (six dollars and ninety cents) per 220 lbs." and "Payment: Dollars 276,000 (dollars two hundred and seventy-six thousand) cash in American currency deposited immediately by cablegram by Messrs. Brown Bros. & Co., New York, who cable sellers and pay this amount to sellers against Through-Bills of Lading issued." "Credit

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opened [with Brown Bros. & Co.] wont be annulled nor withdrawn:" or in other words that credit was "to be irrevocable, not to be withdrawn and not to be cancelled." Shorter expression for this kind of credit appear to have been "bank guarantee" and "confirmed credit." Receipt of this order was acknowledged to the defendants by the agents who cabled it to the plaintiff. But the reply of the plaintiff through its agents was transmitted under date of September 13 and was received by the defendants on September 14. It was in these words: "We confirm sale additional forty thousand Rex hundred kilos cottons Linden Lindstrom six dollars and ninety cents free on board Boston cash New York. . . . Arrange immediately confirmed credit two hundred and seventy-six thousand dollars Brown Bros. Company."

It is plain that if the communications had ended here there would be no contract. The time limit of the offer by the defendants to make the purchase expired on September 12 and the acceptance of that offer by the plaintiff, although unequivocal in terms, was not sent by the agents until September 13 and was not received by the defendants until September 14. This was two days after the offer of the defendants expired according to its express terms. But the communications between the parties did not end here. On September 14 the defendants wired the agents, — "Confirm we bought further 40 thousand sacks Rex per Canton and further two thousand Sovereign same price and terms as previously Sovereign shipment September Scandinavian tonnage subject to depositing equivalent amount Kronas with Skandinaviska Kreditaktiebolaget until dollars available confirm by wire." The Skandinaviska Kreditaktiebolaget was a bank in Gothenberg. Receipt of the telegram of the defendants of September 14 adding the new condition was acknowledged by the agents by telegram in these words: "We confirm having wired Kehlor Flour Mills yesterday that for the further forty thousand Rex bought by you per steamer Canton end October from Boston at price and terms as former lot equivalent amount in Kronas will be deposited with Skandinaviska Kreditaktiebolaget until dollars available for same." The same in substance was written on the same date by the agents to the defendants. On September 16 the agents sent a telegram to the defendants in these words: "Kehlors cable, 'confirm Linden forty thousand rex steamer Canton Boston end October six

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ninety arrange irrevocable credit Brown Brothers have bought wheat to fill contract and must commence shipping flour promptly.' Order Kreditaktiebolaget instantly through Brown Brothers cable Kehlors deposit preliminarily made of equivalent amount kronas until dollars available which must be procured with the utmost despatch and also that the deposit will neither be withdrawn nor cancelled confirm by wire to us that so has been done." The portion of this telegram enclosed in subquotation marks was in English, being the quotation of a cablegram from the plaintiff to the agents, sent in reply to their cablegram transmitting to it the telegram of the defendants of September 14, and the rest of the telegram was in the Swedish language. On the same day, September 16, the agents wrote to the defendants reciting their telegram of even date and adding, — "and we are awaiting your immediate wire confirmation that the equivalent for the last 40,000 sacks Rex for shipment per the S. S. Canton end October has been preliminarily deposited with the Skandinaviska Kreditaktiebolaget in Swedish currency until dollars obtainable in the course of a few days, in which respect all efforts are made from your side, and that the Skandinaviska Kreditaktiebolaget wire to Kehlors today hereabout through Brown Bros. & Co., New York, and that the deposit be neither withdrawn nor cancelled."

In order to determine the meaning of the telegram and letter, both under date of September 16, of the agents, including the copy of the plaintiff's cablegram to them in reply to the defendants' final offer, sent to the defendants, it is necessary to analyze the meaning of the defendants' proposition to purchase. That proposition in its final form depends upon three different writings: (1) the original contract to which reference is made for "price and terms," (2) the telegram of the defendants of September 10, and (3) their telegram of September 14. The pertinent parts of these already have been quoted.

There would be no doubt as to the meaning of the contract if it depended on the first two writings alone. It is the third which causes difficulty. That instrument contained a variation from the earlier offer. That telegram of September 14 was not a breaking off of previous negotiations, but a continuance of them. Its first three words, namely, "Confirm we bought," incorporate all

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that had gone before (so far as not then to be modified) and is the language of an intent to express a completed transaction. But there is one new condition added, and the whole contract must be treated with that "subject" clause incorporated. In order to ascertain the complete offer of the defendants, their several communications must be put together. So far as concerns the crucial matter of payment, these terms were "Dollars 276,000 (dollars two hundred and seventy-six thousand) cash in American currency deposited immediately by cablegram by Messrs. Brown Bros. & Co., New York, who cable sellers and pay this amount to sellers against Through-Bills of Lading issued." "Credit opened wont be annulled nor withdrawn" (from the first contract and embodied by reference in the telegram of September 10 and in the telegram of September 14) "subject to depositing equivalent amount Kronas with Skandinaviska Kreditaktiebolaget until dollars available" (from the telegram of September 14.)

The meaning of this last condition in connection with the words "same price and terms as previously" preceding in the telegram of September 14, and with what had before passed between the parties, is that irrevocable credit was to be established with the New York bankers of an amount sufficient so that the price could be paid to the plaintiff against through bills of lading issued, but that in place of this being done "immediately" as required in the earlier contract, an equivalent amount of kronas, that is, an amount of kronas sufficient to establish the credit in New York, was to be deposited immediately in the bank in Sweden until such reasonable time as exchange in dollars could be procured, but in any event within such time before shipment as would fully secure the plaintiff. By no fair construction of these writings can it be said that the condition established by the words following and including the word "subject" in the telegram of September 14 expunged that part of the previous correspondence which required the establishment of irrevocable credit with Brown Brothers and Company in New York in dollars to an amount sufficient to meet the payments as and when required. All these provisions of the original contract are imported into the final offer of the defendants by the use in the telegram of September 14 of the words "same price and terms as previously." The words "and terms" in this connection would have no meaning,

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if the entire statement of the provision as to payment was intended to be comprehended in the condition as to the deposit of kronas in the bank in Sweden until the defendants could purchase New York exchange in dollars. The contract price was not in kronas, but in dollars. The place of payment was not Sweden, but New York. The time of payment was when through bills of lading were issued on the steamer Canton expected to sail the last of October. The deposit was to be made immediately. These elements of the contract were not changed by the telegram of September 14. The form of expression used in the telegram of September 14 is incompatible with any other idea than that the main terms of the earlier contract and proposal are retained. The collocation of the words "same price and terms as previously . . . subject to depositing equivalent amount Kronas . . . until dollars available," denotes that the words following "subject" are subsidiary to the dominant provisions as to price and terms previously stated. Neither in form nor in substance do they indicate an elimination of the terms previously stated. The meaning cannot be attributed to them that the place, time and currency of payment are changed and all expense in respect thereto is shifted from the buyer to the seller. It cannot be thought that the defendants intended, or that the plaintiff could have understood that they intended, all these terms to be obliterated, as they would or might be, if the condition as to the deposit of the equivalent amount of kronas in the Swedish bank be given a meaning inconsistent with the idea that irrevocable credit should be established with Brown Brothers and Company in New York in time to satisfy all requirements of the contract as to payment. It is further manifest that no such meaning was intended, because the condition was also that the deposit of kronas was to continue only "until dollars available," or "obtainable" (as shown by another translation of that telegram), thus making clear that exchange was still to be at the expense of the defendants and that payment was to be made in dollars in New York.

The offer as thus made by the defendants does not appear to us to be ambiguous or open to reasonable doubt. It is certain and explicit. This being the meaning of the defendants' offer, the reply of the plaintiff to that offer must be interpreted in the light of that meaning.

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Whether the plaintiff accepted this offer of the defendants according to its terms depends upon the meaning of the telegram and letter of the agents to the defendants dated September 16. That telegram and letter included a copy of the plaintiff's cablegram in reply to the defendants' offer of September 14 transmitted to it by their agents. That cablegram was in terms a confirmation of the defendants' offer for forty thousand sacks of flour to be shipped on the steamship Canton sailing from Boston at the end of October. The reference to the irrevocable credit with Brown Brothers and Company was to one of the terms of the defendants' offer. It was not in any fair sense a counter offer or the suggestion of a new condition. Irrevocable credit with Brown Brothers and Company was one of the essential terms of the original proposition made by the defendants. That had not been modified or withdrawn by their telegram of September 14. The only qualification of the original contract as to terms of payment wrought by that telegram was to modify the word "immediately" in that part which required the immediate establishment of irrevocable credit with Brown Brothers and Company by a provision to the effect that the immediate deposit might be made in kronas in the bank in Sweden in order to give the defendants more time, if they desired, in purchasing New York exchange, and thus seasonably establishing the irrevocable credit with Brown Brothers and Company. The reference to this irrevocable credit in that connection was simply to one term of the offer already made. It was nothing new or additional. This is made clear by the amplifying words used by the agents in transmitting to the defendants the cablegram of the plaintiff. They urged the defendants to direct the bank in Sweden to cable to Brown Brothers and Company that the preliminary deposit of kronas equivalent in amount to the dollars required to make the payment had been made, and to procure necessary exchange with despatch. The statement in the plaintiff's cablegram that we "have bought wheat to fill contract and must commence shipping flour promptly" was a plain intimation that it had accepted the offer of the defendants.

The acceptance of the defendants' offer contained in the telegram and letter of the agents to the defendants under date of September 16 was unequivocal. The mention of the irrevocable

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credit with the New York bankers may be construed either as directing attention to one of the terms of the contract of particular importance to the plaintiff, or as an instruction to their agents to see that this term of the contract was carried out. But it is not susceptible of the construction that a new or different term was imported into the transaction.

The offer of the defendants completed by their telegram of September 14 was accepted according to its terms by the telegram and letter sent to them by the agents on September 16. If there had been mistake or misunderstanding of the meaning or effect of a written contract plain in its terms, this circumstance alone would be no reason for not enforcing the contract.

Both parties construed the contract as concluded. The plaintiff made purchases in order to supply the flour. The defendants made efforts as appears from their correspondence to procure American exchange. They engaged the necessary space for transportation of the flour on the steamship Canton. There were several letters and some telephonic communications between the agents and the defendants subsequent to September 16. But they all relate to incidental or subsidiary matters and do not modify the rights of the parties as fixed by the contract. Neither party in correspondence or otherwise, until after October 1, made any contention that the contract was not closed.

No deposit of equivalent amount of kronas was made by the defendants with Skandinaviska Kreditaktiebolaget. There was considerable correspondence and telephonic communication between the agents and the defendants about purchasing exchange on New York in order that the defendants might make deposit of the required sum there, but it came to naught because the defendants regarded the rate of exchange as too high. If this be treated as material, there was uncontradicted evidence to the effect that average exchange in normal times was 3.77 kronas for one dollar, and that that figure was known as par in times of peace; that normal exchange in September, 1914, was disturbed by reason of the great war and that exchange could have been purchased at the rate of about 3.91 kronas for each dollar in New York between September 15 and October 6.

The contract required, according to the interpretation here given to it, that the defendants should immediately deposit

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kronas in the bank in Sweden to an amount equivalent to the irrevocable credit required with the New York bankers. That was not done. No irrevocable credit as set forth in the contract was established with these bankers at any time. There was a breach of the contract by the defendants in not pursuing one or the other of these two courses immediately. Under date of October 7 the plaintiff sent its first direct communication to the defendants by cablegram in these words: "Unless telegram received by us from Brown Brothers on or before October ninth that irrevocable credit (for two hundred and seventy-six thousand dollars) second forty thousand has been established and confirmed will consider you have broken contract and hold you responsible all resulting damages." No such telegram was received by the plaintiff. In the meantime the price of flour had fallen. The delay until October 9, but no longer, was waived by the plaintiff.

It was said by Chief Justice Bigelow in *Mullaly* v. *Austin*, 97 Mass. 30, 32: "The rule of law is perfectly well settled that an action may be maintained to recover damages for the breach of an executory contract, before the expiration of the time when the stipulations of the respective parties, if there had been no breach, would have been fully performed. If one party is guilty of a clear infraction of the terms of an agreement, which virtually puts an end to it, the other party is not compelled to delay his remedy therefor, because a portion of the contract still remains executory. The breach by one party, by an absolute refusal to fulfil the contract on his part, renders performance by the other party impracticable, and the right to indemnity by an action for damages at once accrues." *Bullard* v. *Eames*, 219 Mass. 49, 53. That principle is applicable to these facts. The plaintiff is entitled to have its damages assessed as of October 9. In accordance with the terms of the report the entry may be

Judgment for the plaintiff for the amount found by the jury.

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WILLIAM A. COPELAND, executor, *vs.* ARTHUR W. WHEELWRIGHT & others.

WILLIAM A. COPELAND, executor, petitioner.

Suffolk. December 3, 1917. — May 23, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

Compromise of Controversy Concerning Will.

Where by the terms of a will offered for probate a trust was created for the benefit of an unmarried son and a married daughter of the testator, and it was provided that upon the death of the son without issue within twenty years after the death of the testator the share of the son should go to his heirs at law, and where at the time of the testator's death the heir presumptive of the son was his sister and in case of her death his heirs presumptive would be her three minor children, a compromise agreement under R. L. c. 148, §§ 15–18, executed by all the persons designated in those sections, including the daughter of the testator and a guardian *ad litem* representing her three minor children and also representing all future contingent interests of persons unascertained and not in being who might become interested, which gives the son his share in the trust property outright, thus cutting off all possible benefit which could come to the son's heirs at law under the terms of the will, may be found by the Probate Court under St. 1903, c. 222, to be just and reasonable in its effect upon any future contingent interests that might arise under such will within the meaning of R. L. c. 148, § 17.

TWO PETITIONS, filed in the Probate Court for the county of Suffolk on January 16, 1917, by one of the persons named as executors and trustees in the will of John W. Wheelwright, late of Boston, to vacate decrees of that Probate Court made on June 6, 1916, approving a compromise agreement under R. L. c. 148, §§ 15–18, as amended by St. 1903, c. 222, and ordering that the will of John W. Wheelwright be allowed but to be executed according to the terms of such compromise agreement. The Probate Court made decrees dismissing the petitions, and the petitioner appealed.

The cases came on to be heard by *Crosby*, J., who at the request of the parties ordered that the cases be consolidated and reserved them for determination by this court.

The will of John W. Wheelwright was dated June 5, 1899. The material portions of the will were as follows:

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"I give, bequeath and devise the entire estate, both real and personal which may belong to me at the time of my decease, to my son Arthur William Wheelwright, Arthur T. Lyman and William A. Copeland and the survivors or survivor of them, to have and to hold to them, their heirs, successors and assigns respectively, but in trust nevertheless for the uses and purposes following, to wit: To hold and manage the same, keeping the real estate in repair and insured against fire, and after paying all necessary charges and expenses of said management, including taxes, to pay the income of all said property quarterly, in three equal shares to my wife, Sarah Wheelwright, my son, Arthur W. Wheelwright, and my daughter, Laura, the wife of George H. Windeler; and in case of the decease of my said son or daughter, leaving issue, then to pay such issue the share thereof which the parent would have been entitled if alive; with the understanding, however, that this trust as to the daughter's share, or third part of the property is to continue during her lifetime; but is to terminate as to the share of my wife Sarah, and son Arthur in twenty years after my decease, or sooner, as to the income payable to either or both of them, in case of their decease before the expiration of said twenty years; and in the event of the decease of them or either of them within twenty years the share of income herein given to the deceased shall go to her or his heirs at law until the expiration of said twenty years, when the principal sum is to be paid over to the heirs at law of such deceased as if it had to come to them under the laws of descent.

"In case of the decease of my daughter Laura during my lifetime, leaving no issue, her share of the income and principal is to go to my wife and son in equal parts, or to the survivor of them; but in case of her death at any time leaving issue, my will is that her share of the income and principal be held and retained by said trustees or their successors, and the survivor of them, for the use and benefit of such issue until the youngest child shall have attained the age of twenty-one years, and then paid over to them in equal shares.

"My will is that if either of the three above-named beneficiaries shall die in my lifetime without issue, the survivors or survivor of them shall take in equal parts the share of such deceased; and if either of them so dying shall leave issue, then that his or her

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share shall go to such issue by right of representation, upon their attaining respectively the age of twenty-one years, till which time it shall remain in the hands of said trustees or their successors."

"At the expiration of twenty years from my decease, the trustees abovenamed, or their successors or the survivors of them are to convey to my wife, or her then heirs at law, or to such persons as she may by will appoint, one-third of said trust property, and to my son, Arthur W., or his heirs at law one-third thereof free of said trust; and at the decease of my daughter, Laura, and the arrival at majority of the youngest of any child left by her, they are to convey to her then heirs at law the one-third share or portion of my estate bequeathed in trust to her as aforesaid with any increase thereof while remaining in their possession."

The agreement of compromise was dated May 26, 1916. The manner of its execution is described in the opinion. By the agreement the portions of the will quoted above were stricken out and there were substituted the following provisions:

"All the rest and residue of my estate, real and personal, which may belong to me at the time of my decease, I direct shall be divided into two equal portions, and one of said portions I give to my son Arthur W. Wheelwright for his absolute property in fee, and the other of said portions I give to my son Arthur W. Wheelwright, William A. Copeland and William Endicott, to have and to hold to them, their heirs and assigns, but in trust for the following uses and purposes, to wit: after paying all necessary charges and expenses of the management thereof, including taxes thereon, to pay the net income thereof, quarterly, to my daughter Laura, wife of George H. Windeler, during her life and on her decease leaving issue her surviving not exceeding one-third of the net income thereof shall be paid to her surviving husband during his life if my daughter shall by will so direct and appoint, if such surviving husband was born in my lifetime, and the remainder of said net income, and the whole, after the decease of said husband, or in case no such appointment is made by my daughter, shall be paid quarterly to her children surviving at the time of such payments, the surviving issue of any deceased child to take the parent's share by right of representation.

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Twenty years after the decease of said Laura, or sooner if there shall at any time before the expiration of said twenty years be no children of said Laura surviving, said trust shall terminate except as to so much of the said property as may be held in trust for the benefit of a husband of said Laura as herein provided, and the principal shall be paid to the then surviving issue of said Laura taking by right of representation and if there are no issue of said Laura then surviving said principal shall be paid as said Laura shall by will appoint and in default of issue then surviving and of appointment by will is to be paid to those persons who would be entitled to receive the same had said Laura then died intestate possessed thereof as her own absolute property. If any part of the principal is held for the benefit of a husband of said Laura after the termination of the trust as to the rest of said share held for her benefit as herein provided, the same shall at the decease of such husband be paid to the then surviving issue of said Laura taking by right of representation, and if there are no such issue then surviving shall be paid as said Laura shall by will appoint and in default of issue then surviving and of appointment by will is to be paid to those persons who would be entitled to receive the same had said Laura then died intestate possessed thereof as her own absolute property.

"Whenever it is necessary or desirable to divide the principal of the trust estate I give to those persons who shall then be trustees hereunder power to value the property constituting the trust estate and to set off such portions thereof to the persons entitled thereto and for the purposes hereof at such valuations as to them may seem fair and equitable, the judgment of the trustees to be final in the matter."

F. T. Field, for the petitioner.

H. Wheeler & H. S. Davis, for different respondents.

RUGG, C. J. These petitions were brought to vacate two decrees of the Probate Court, one authorizing and approving an agreement for compromise of a controversy over the allowance of the will of John W. Wheelwright, and the other allowing his will but directing it to be executed and his estate administered in accordance with the agreement. These petitions were filed after the expiration of the time limited for appeals from the decrees.

The grounds alleged in each petition are that the Probate

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Court had "no legal power or authority to enter the same" and that therefore they are "without validity and effect."

The pertinent facts are that John W. Wheelwright died in April, 1916, leaving an instrument purporting to be his last will. He had been an insane person under conservatorship for many years. When his will was presented for allowance, doubts existed as to his testamentary capacity. He left no widow, and his next of kin were an unmarried son aged about fifty-two and a married daughter with three minor children. It is contended that the instrument as drawn was "difficult to construe." Apparently, however, it established a trust for the benefit of the son and daughter, with remainder as to the share of the son in certain contingencies to his heirs at law. His heirs presumptive at that time were his sister and, in the event of her decease, her children. The remainder of the share, of which the sister was entitled to the income during her life, was for the benefit of her issue. The son was appointed one of the executors and was one of the petitioners for the allowance of the will. The daughter appeared to contest the will. It was under these circumstances that the agreement for compromise of contest as to the allowance of the will was made.

It was executed and approved in accordance with the procedure marked out in R. L. c. 148, §§ 15–18 as amended by St. 1903, c. 222. The formal requirements of the statute were strictly observed. A guardian *ad litem* and next friend was appointed to represent ascertained interested minors (being the children of the daughter), and all other persons unascertained and not in being, who might be or become interested. This guardian signed the agreement for compromise in each capacity. It was signed also by all the other parties in interest. The terms of the agreement need not be set forth in detail. It is enough to say that under it the provisions in the will for the benefit of the heirs at law of the son are not to be executed, an absolute interest is to be enjoyed by the son and the terms of the trust for the benefit of the daughter and her issue are to be executed in a manner different from that set forth in the will.

Such an agreement is within the scope of the statute. Manifestly there was ground for a genuine contest respecting the testamentary capacity of the deceased. It was not a vexatious

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or frivolous contest. Nor is there anything to indicate that the controversy was feigned or simulated or a mere form without real substance contrived as a mask whereby disappointed legatees might induce a court to approve a distribution of the estate more satisfactory to themselves than was designed by the testator. *Blount* v. *Wheeler*, 199 Mass. 330.

The general purpose and effect of this statute has been stated in numerous cases. Most of them are collected in *Ellis* v. *Hunt*, 228 Mass. 39, where the subject is discussed. Its design was, in cases of real controversy between persons claiming as beneficiaries under a will and the heirs at law of the deceased, to establish a means for settling that controversy and binding future contingent interests, however complicated they may be under the will. The conditions imposed by the statute for such a settlement are that (1) all persons in interest capable of acting for themselves and guardians of those persons in interest ascertained and in being, not competent to act for themselves, shall sign the agreement, (2) a guardian shall be appointed with official responsibility and duty to investigate fully and protect all unascertained and future contingent interests, and (3) the agreement must be found by the court to be just and reasonable in relation to the parties in being and in its effect upon any future contingent interests and bequests to charities, and a decree expressive of that finding must be entered. These are the only limitations upon the scope of such an agreement for compromise in writing specified expressly in the statute. It is a necessary consequence of these broad provisions that the terms of such an agreement for compromise may affect seriously future contingent interests. Persons not under any legal disability have apart from the statute full power to enter into contracts respecting the disposition of property to which they are entitled under wills, and such agreements will be enforced in equity. The statute enables future contingent interests to be affected by agreements in addition to vested interests. Doubtless that was one of its main purposes. It affords the sanction of judicial approval to the form and substance of the agreement. It vests the enforcement of the terms of the agreement in the executor or the administrator with the will annexed.

The agreement in the case at bar was entered into by all the heirs at law and by the legatees and devisees. It was between

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adversary parties. It is not necessary to determine whether in such a case the future contingent interest must be represented not only by a guardian but also by the holder of an interest. In passing it may be observed that there may be cases where the present holder would be practically sure not to be the taker. See *Elder* v. *Adams*, 180 Mass. 303. In the case at bar the daughter of the deceased and her children were the heirs presumptive of the son. They all were parties to the agreement. It was for the interest of these children to support the claims of the heirs of the son, their uncle.

The agreement contains concessions by the legatees under the will sufficient to support its character as a compromise. *Dexter* v. *Codman*, 148 Mass. 421, 423.

There is nothing in the express terms of the statute which prevents the entire extinguishment by agreement of a future contingent interest in appropriate circumstances. Such an interest may be so remote, and its actual enjoyment so improbable that its retention would appear to be nothing more substantial than a film of mist. The existence of an imaginary or even an extraordinary possibility is not enough to prevent such an agreement from having force when approved as required by the statute. It is conceivable that future contingent interests may be of such tenuous nature that it would be just and reasonable to remove them even so far as concerns such interests rather than to permit them to remain a cloud upon other rights arising in the estate. It is hard to imagine cases where it can be found in judicial proceedings that an agreement is "just and reasonable . . . in its effect upon any future contingent interests that might arise under" a will which absolutely wipes such interests out of existence. Yet it hardly seems possible to say as matter of law that there can be no such cases. The statute does not confer power to make a new will or to render the allowance of a will subject to approval as to the wisdom of its terms by interested parties and the court. That is not its scope. The statute imposes a duty of the most scrupulous care to see that the compromise viewed with reference to the basis for contest, is just and reasonable in all its aspects, including its effect upon future contingent interests. This duty rests upon the guardian and particularly upon the court to see that no such interest be utterly extinguished unless

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it is insubstantial. As a practical question, it doubtless was with respect to this point that the cautionary words were used in *Neafsey* v. *Chincholo*, 225 Mass. 12, 18. It is a power which ought to be exercised with the utmost caution. But it cannot be said as matter of law that a case may not exist where the future contingent interest may be so shadowy that it may be said to have no real foundations for substantial expectation and therefore justly and reasonably may be held not worthy of enforcement. There is a remote analogy to the removal of restrictions upon real estate, the enforcement of which would be inequitable. See *Jackson* v. *Stevenson*, 156 Mass. 496; *McArthur* v. *Hood Rubber Co.* 221 Mass. 372; *Riverbank Improvement Co.* v. *Chadwick*, 228 Mass. 242. Of course the evidence upon which the Probate Court acted is not before us and the only question raised is one of jurisdiction. If the Probate Court made a wrong decision on the evidence that is not open to review in this proceeding. *Jones* v. *Jones*, 223 Mass. 540, 543. For these reasons it cannot be said that that court was without jurisdiction to enter these decrees.

The statute may be viewed from another point. It was enacted before the death of John W. Wheelwright and before the execution of his will. The disposition of the property of a person deceased is largely a matter of statute. The statute in question may be treated as a provision to the effect that, where a will creates future contingent interests, the precise extent to which it shall be executed, in cases where all other parties in interest in the estate make an agreement upon that subject, shall depend upon a judicial decree entered upon general principles of justice and reason following a full investigation and report by an independent officer appointed by the court. The general interest of the public that property shall not be entangled by the impalpable and unreal possibility of uncertain and improbable contingencies springing up in the future, might support such an enactment. See, in this connection, *United States* v. *Perkins*, 163 U. S. 625; *Matter of Bergdorf*, 206 N. Y. 309; *State* v. *Hamlin*, 86 Maine, 495, 505.

The statute as thus interpreted is constitutional. That was decided as to § 14 of this same chapter 148 after great consideration in *Clarke* v. *Cordis*, 4 Allen, 466. The principles there expounded are decisive of the present case. They need not be repeated. The reasoning of that case is conclusive of this. See, in

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this connection, *Loring* v. *Hildreth*, 170 Mass. 328, 330; *Sewall* v. *Roberts*, 115 Mass. 262; *Tyler* v. *Court of Registration*, 175 Mass. 71; *Adams* v. *Adams*, 211 Mass. 198.

Clarke v. *Cordis*, 4 Allen, 466, was decided and St. 1864, c. 173 (the first form of the sections of the statute now under consideration), was enacted before the adoption of the Fourteenth Amendment to the Federal Constitution. The grounds upon which that decision rests, however, seem to us to demonstrate that no guaranty of that amendment is infringed by the present statute. Numerous decisions of the Supreme Court of the United States appear to us to go quite as far as is required to uphold this statute. *Blinn* v. *Nelson*, 222 U. S. 1, 7. *American Land Co.* v. *Zeiss*, 219 U. S. 47. *Christianson* v. *King County*, 239 U. S. 356, 373.

Decrees dismissing petitions affirmed.

JOSIAH C. FULLER, administrator, *vs.* EDITH ANDREW.

Plymouth. December 4, 1917. — May 23, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Practice, Civil, Report by judge. *Nuisance. Negligence*, Causing death, Matter of conjecture. *Tide Water. Wharf. Evidence*, Of conscious suffering, Matter of conjecture, Presumptions and burden of proof.

After a verdict has been returned for the plaintiff in an action at law and when a motion for a new trial is pending, if the presiding judge is of opinion that the verdict should be set aside solely because of excessive damages and is in doubt as to the status of the defendant's exceptions taken at the trial in case the verdict in its entirety is set aside solely for that reason, and if the questions of law that arose at the trial affect decisive issues as to liability, it is proper for the judge to report the case for determination by this court and he has power to do so without passing first on the motion for a new trial.

Where the owner of land on the seashore of an island in a harbor sold loam from the island to a contractor and agreed that the contractor might build a pile pier for the purpose of taking away the loam purchased by him, with the privilege of removing the pier, which, if not removed, was to become the property of the landowner, and where the contractor built such a pier extending into tide water, which was an obstruction to navigation, without obtaining any license from the harbor and land commissioners as required by R. L. c. 96, § 17, and, after having used the pier for shipping the loam purchased by him, did not remove the pier, which thereafter was in charge of an agent of the landowner although not used by the landowner, the structure so far as it extends into tide water is a public nuisance, and the landowner is liable under St. 1907, c. 375, for the death of a person in the exercise of due care caused by such obstruction to navigation.

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In an action against the landowner maintaining the pile pier extending into tide water above described for causing the death by drowning of a person by reason of the collapse of a part of the pier when a motor boat in which such person was travelling was driven against and under the pier by force of the wind and waves, it appeared that the portion of the structure which fell on the motor boat was supported by piles driven by the loam contractor into the bed of the harbor below low water mark, where the soil belonged to the Commonwealth as the owner in fee, and it was *held*, that, the pier having been built with the knowledge and consent of the defendant as a single structure, it was intended to be used and had been used as a unit, of which all the parts were necessary elements, and that the whole of the pier must be treated as maintained by the defendant, upon whose land one end of it rested, it having been designed for use solely in connection with that land.

Distinction *pointed out* by RUGG, C. J., between a public and a private nuisance in regard to the requirement of a notice to abate the nuisance in order to create liability.

Evidence of the maintenance of a public nuisance in tide water in violation of the express terms of a penal statute and dangerous in fact to those members of the public lawfully navigating in the neighborhood is evidence of negligence under St. 1907, c. 375.

In the case above described it was *said* that, in addition to the fact of the maintenance of the public nuisance, there also was evidence in regard to the condition of weakness and want of repair into which the pier had been suffered to fall which tended to show lack of care.

In the case above described there was a count for the conscious suffering of the plaintiff's intestate, who was a woman. She last was seen alive in the cockpit of the motor boat when it came in contact with the pier and her body was found on the shore the next morning about a quarter of a mile from the pier. The medical examiner, who made an examination but performed no autopsy, found that drowning was the cause of her death. There was a discoloration of one eye and a bruise on the head which indicated a blow sufficiently severe to have caused unconsciousness instantaneously. No fracture of the skull was indicated. The medical examiner made no examination of the lungs to determine whether there was water in them. There was nothing to indicate whether the blow on the head came before or after the fall into the water. *Held*, that there was no evidence for the jury of conscious suffering, it being wholly a matter of surmise and conjecture whether there was such suffering or not.

In the case above described it appears to have been assumed that, in the absence of evidence in regard to the due care of the plaintiff's intestate, the intestate under St. 1914, c. 553, was presumed to have been "a person . . . in the exercise of due care" within the meaning of St. 1907, c. 375.

TORT, by the administrator of the estate of Ellen Hull Fuller, late of Quincy, for the death of the plaintiff's intestate on September 26, 1915, and the conscious suffering immediately preceding it, alleged to have been caused by the falling upon the intestate of a part of a wharf or pier alleged to have been maintained by the defendant in a defective and unsafe condition and to have been an unlawful structure maintained as a public nui-

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sance at a point known as West Head on Peddocks Island in Boston Harbor, the first count of the declaration being under St. 1907, c. 375, and the second count being at common law for conscious suffering. Writ dated May 9, 1916.

In the Superior Court the case was tried before *Quinn*, J. The material evidence is described in the opinion. At the close of the evidence the judge denied motions of the defendant that a verdict be ordered in her favor both on the count for causing death and on the count for conscious suffering.

The defendant then asked the judge to make certain rulings, among which were the following:

"6. The defendant, as the owner of the land from which the wharf in question projected into the tide waters of the State, owed no duty to the plaintiff's intestate to see that the wharf was so constructed and maintained that it would not collapse when struck by a boat of which the plaintiff's intestate was an occupant.

"7. The fact that the wharf was built and allowed to remain standing without a license from the harbor and land commissioners, is not itself sufficient evidence of negligence on the part of the defendant to support a verdict in favor of the plaintiff, and unless the jury shall find that there is other evidence of negligence on the part of the defendant the verdict must be for the defendant.

"8. The fact that the wharf was built and allowed to remain standing without a license from the harbor and land commissioners is, at most, but some evidence of negligence on the part of the defendant, the effect of which evidence may be diminished or entirely rebutted by other evidence in the case."

"18. If the jury shall find that the wharf was erected by an independent contractor not employed by the defendant, and that such contractor built the wharf for his own purposes and failed to obtain a license from the harbor and land commissioners for the erection and maintenance of the wharf in the tide waters of the State, such failure on the part of the independent contractor is not evidence of negligence on the part of the defendant toward any person injured by a collapse of the wharf resulting from a collision between the boat of which such person was an occupant and the wharf."

The judge refused to make any of these rulings and submitted

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the case to the jury with other instructions, which included the following:

"It appears to be undisputed from the testimony that there was no permit secured at the time it [the pier] was erected and no permit secured for its maintenance. . . . If any structure unauthorized in the nature of a pier or wharf be extended out into navigable waters and substantially interferes with navigation, the proper use of the water, and harm comes to one by reason thereof, you may be justified in concluding under the law of this Commonwealth that such a structure was a nuisance. And the matter of nuisance itself does not necessarily involve a question of negligence. . . . Having in view and thought all the uses of the sea and the natural conditions which may arise from changes in weather, in wind, and the results that may be probable, looking at it broadly and fairly, was this structure, this pier, an interference with travel on the sea? If it was in your judgment, you will conclude and you will be justified in concluding that it was a nuisance. . . . Here you may consider whether or not the presence of this pier in the stream had to do with this injury. If it was unlawfully placed there and you so conclude, did it contribute to bring about this accident? If it did, no matter how slight the part it contributed to the accident, and it is a nuisance and the persons injured were exercising due care, a defendant maintaining such a nuisance is liable for the injuries sustained."

At the close of the charge the defendant excepted "to such portions of the charge as in substance instructed the jury that if the wharf constituted a public nuisance and contributed to cause the death of the plaintiff's intestate while she was in the exercise of due care, the defendant is liable." She also excepted to a similar instruction as applied to the liability of the defendant for conscious suffering of the plaintiff's intestate.

The jury returned a verdict for the plaintiff in the sum of $10,348.33 for the death and $1,034.83 for conscious suffering.

The defendant filed a motion for a new trial on the ground that the verdict was against the evidence, against the weight of the evidence, and against the law, and that the damages awarded to the plaintiff on both counts of the declaration were excessive.

The judge, "being of opinion that the verdict should be set aside solely because of excessive damages" and being in doubt as to the

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status of the defendant's exceptions taken at the trial if the verdict should be set aside in its entirety for that cause, reported the case for determination by this court of the questions of law raised. If the rulings of the judge at the trial were erroneous and harmful to the defendant, such order was to be made as this court might conclude to be proper. If his rulings were correct, the case was to be remanded to the Superior Court for final action on the motion for a new trial solely on the ground of excessive damages.

The plaintiff objected and excepted to the reporting of the case before disposing of the motion for a new trial, and the judge so stated in his report.

R. L. c. 96, § 17, is as follows:

"Section 17. Said board [of harbor and land commissioners] may license and prescribe the terms for the construction or extension of a wharf, pier, dam, sea wall, road, bridge or other structure, or for the filling of land or flats, or the driving of piles in tide water below high water mark, but not, except as to a structure authorized by law, beyond any established harbor line, nor, unless with the approval of the Governor and Council, beyond the line of riparian ownership. . . ."

R. L. c. 171, § 2, as amended by St. 1907, c. 375, is as follows:

"If a person or corporation by his or its negligence, or by the negligence of his or its agents or servants while engaged in his or its business, causes the death of a person who is in the exercise of due care and not in his or its employment or service, he or it shall be liable in damages in the sum of not less than five hundred nor more than ten thousand dollars to be assessed with reference to the degree of his or its culpability or of that of his or its agents or servants, to be recovered in an action of tort, commenced within two years after the injury which caused the death, by the executor or administrator of the deceased, one half thereof to the use of the widow and one half to the use of the children of the deceased; or, if there are no children, the whole to the use of the widow; or, if there is no widow, the whole to the use of the next of kin."

St. 1914, c. 553, is as follows:

"Section 1. In all actions, civil or criminal, to recover damages for injuries to the person or property or for causing the death of

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a person, the person injured or killed shall be presumed to have been in the exercise of due care, and contributory negligence on his or her part shall be an affirmative defence to be set up in the answer of, and proved by the defendant.

"Section 2. All acts and parts of acts inconsistent herewith are hereby repealed.

"Section 3. This act shall take effect upon its passage, but shall apply only to actions or causes of action hereafter accruing."

A. L. Stinson, for the plaintiff, submitted a brief.

G. K. Gardner, for the defendant.

RUGG, C. J. This case comes before us by report, after a verdict but while a motion for a new trial is pending, the presiding judge stating that he is of opinion that the verdict should be set aside solely because of excessive damages. The questions of law presented by the report arose at the trial before the jury and affect decisive issues as to liability. Power to report exists under these circumstances. St. 1910, c. 555, § 5. *Smith* v. *Lincoln*, 198 Mass. 388, 392. *Strong* v. *Carver Cotton Gin Co.* 202 Mass. 209, 212. *Lee* v. *Blodget*, 214 Mass. 374. *Chertok* v. *Dix*, 222 Mass. 226, 228. *Edwards* v. *Willey*, 218 Mass. 363. *Weil* v. *Boston Elevated Railway*, 216 Mass. 545, 549; *S. C.* 218 Mass. 397, 401.

The plaintiff seeks to recover for the conscious suffering and death of his intestate. St. 1907, c. 375, § 1. On the morning of September 26, 1915, a party, of whom the plaintiff's intestate was one, embarked on a motor boat for a day on Boston harbor. The injuries to the deceased resulted from the collapse of a portion of a pile wharf when the boat was driven against and under it by the force of wind and wave during a heavy blow in the evening of that day. The wharf was a wooden pile structure about two hundred and fifty feet long, twenty feet wide, and at its outboard end about nineteen feet in height above mean low water. It projected from the shore of the defendant's land on Peddocks Island in Boston harbor. It was in the water below mean low water for about one hundred and forty feet, and it was a part of this portion which collapsed on the boat in question. It was built in 1909 by Thomas H. Gill and Company by virtue of an agreement with the defendant relating to the sale by her to them of loam from the island, whereby they were allowed to build the wharf with the privilege of removal, but, if not removed, it was to become the

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property of the defendant. The wharf was used by Thomas H. Gill and Company for their purposes of loading loam, but was not removed by them. Their work ended in 1909. Thereafter the wharf was in charge of the agent of the defendant. There was evidence that neither the erection nor maintenance of the wharf had been licensed by the harbor and land commissioners, as required by R. L. c. 96, § 17.

The wharf might have been found to be an obstruction to navigation. *Attorney General* v. *Woods*, 108 Mass. 436. The absence of a license was sufficient evidence that the wharf was a public nuisance, and that any person who built or maintained the wharf, knowing that it was not licensed, would be liable in a civil action to a person injured, while in the exercise of due care, by collision with it. *Benson* v. *Malden & Melrose Gas Light Co.* 6 Allen, 149. *Fairbanks* v. *Kemp*, 226 Mass. 75. R. L. c. 96, § 25. The character of the wharf as a public nuisance, or the special injury suffered thereby by the intestate, cannot be controverted. It is argued in behalf of the defendant that since the portion of the wharf which fell was supported on piles driven into the bed of the harbor below low water mark by Thomas H. Gill and Company and not by herself, title to that portion of the structure vested immediately in the Commonwealth as the owner of the fee, *Commonwealth* v. *Boston Terminal Co.* 185 Mass. 281, 282, *Commonwealth* v. *Alger*, 7 Cush. 53, 65, and since she has not used the structure she cannot be held responsible for it in any sense. This contention cannot be supported. The wharf was erected with the knowledge and express consent of the defendant. There was a definite agreement between her and Thomas H. Gill and Company that, if the latter did not remove the wharf, title to it should vest in her. It was erected as a single structure. The nature and purpose of its construction required not only the part of it which was upon land of the defendant, but also that which was supported on piles driven below low water mark. While doubtless it would have been possible to remove that portion of the wharf resting upon the bed of the harbor in public ownership, its essential character and previous use demonstrates that it was a unit of which all its parts were necessary elements. One end of it rested upon her land. The manifest design of the whole structure was for use in connection with her land. It is somewhat similar to a build-

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ing, a part of which is within the limits of a public way. The defendant does not appear to have made active use of the wharf. But her agent testified that he had charge of it after Thomas H. Gill and Company left it, that he had been on and round it a good many times, had examined the piles a number of times, and considered them sound. The inference was warranted from all the circumstances and testimony that the defendant took possession of the wharf and exercised control over and hence was responsible for it. *Rockport* v. *Rockport Granite Co.* 177 Mass. 246, 256.

The facts that the defendant did not construct the wharf and was not expressly notified to remove it as a nuisance do not exonerate her from liability as matter of law. There are expressions in decisions to the effect that one who continues a nuisance is liable as well as he who establishes it. *Staple* v. *Spring*, 10 Mass. 72, 74. *Hodges* v. *Hodges*, 5 Met. 205. *Fowle* v. *New Haven & Northampton Co.* 107 Mass. 352, 355. One who is not responsible for the creation of a private nuisance cannot be held liable for its subsequent maintenance merely because he has become the owner of it. It is the general rule that he must have notice to abate it, or knowledge that it is a nuisance and injurious to others, before he can be held liable for it. *McDonough* v. *Gilman*, 3 Allen, 264. *Nichols* v. *Boston*, 98 Mass. 39. But this is not the governing principle as to the maintenance of public nuisances. Ordinarily liability arises for maintaining structures which constitute or cause a public nuisance, whether built by the person charged or by some predecessor in title. This rule is well established, and the distinction between private and public nuisances as to the requirement of notice to abate is thoroughly imbedded in our jurisprudence. *Leahan* v. *Cochran*, 178 Mass. 566. *Hynes* v. *Brewer*, 194 Mass. 435, 439. The wharf being a public nuisance, the defendant may be held responsible, without notice to abate, if other elements of liability are made out.

The wharf was built by Thomas H. Gill and Company, resting partly upon land of the defendant and extending from her land into the waters of the harbor, by virtue of a contract with the defendant with the express stipulation that, if not removed by them, it should become her property and, pursuant to that arrangement, she took possession of it. These facts are sufficient to support the action against her, even though there was no

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direct evidence of knowledge on her part that the wharf was erected without a license.

The plaintiff must show, in order to recover on the count for causing the death of his intestate, some evidence of culpable negligence on the part of the defendant. *Littlejohn* v. *Fitchburg Railroad*, 148 Mass. 478. *Boott Mills* v. *Boston & Maine Railroad*, 218 Mass. 582. But the maintenance of the wharf without a license, in violation of the terms of the statute, and thus constituting a public nuisance, afforded evidence of this nature. *Bourne* v. *Whitman*, 209 Mass. 155, 167. *Berdos* v. *Tremont & Suffolk Mills*, 209 Mass. 489, 496. *Gately* v. *Taylor*, 211 Mass. 60, 64. There was negligence on the part of the defendant in maintaining a public nuisance in tide water contrary to the express terms of a penal statute and dangerous in fact to those members of the public rightly navigating in the neighborhood. There was evidence tending to show lack of care in the state of weakness and want of repair into which the wharf had been suffered to fall, in violation of a legal duty, and that these factors had a causal connection with the injury to the plaintiff's intestate. That was enough to constitute negligence. *Bernabeo* v. *Kaulback*, 226 Mass. 128, 131.

The evidence as to the conscious suffering of the intestate was this: She last was seen alive standing in the cockpit of the boat when it came in contact with the wharf, and her body was found on the shore the next morning about one quarter of a mile distant from the wharf. The medical examiner made an examination, but performed no autopsy. He found drowning to be the cause of death. There was discoloration of one eye and a bruise on the head of adequate size and indicating a blow sufficiently severe to have caused unconsciousness, and, if unconsciousness were caused in that way, it probably would be instantaneous upon receiving the blow. So far as he could make out, there was no fracture of the skull. He made no examination of the lungs to determine whether there was water in them. A person comes to death by drowning in about two minutes, and unconsciousness would ensue in from one to two minutes. Under these circumstances there is nothing to indicate whether the blow on the head came before or after the fall into the water. Whether there was any conscious suffering or not was wholly a matter of surmise and conjecture. There was no evidence of such suffering. The burden

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rested on the plaintiff to establish conscious suffering on the evidence. The case on this point is governed by *Corcoran* v. *Boston & Albany Railroad*, 133 Mass. 507, *Riley* v. *Connecticut River Railroad*, 135 Mass. 292, *Mulchahey* v. *Washburn Car Wheel Co.* 145 Mass. 281, and is distinguishable from *Nourse* v. *Packard*, 138 Mass. 307, *Pierce* v. *Cunard Steamship Co.* 153 Mass. 87, and *Boutlier* v. *Malden*, 226 Mass. 479, 487, 488.

A verdict should have been ordered for the defendant on the count for conscious suffering, and that entry may be made.

The other rulings of the Superior Court were correct. The cause is to be remanded to the Superior Court on the death count for final action on the motion for a new trial on the ground of excessive damages, this being in accordance with the terms of the report.

So ordered.

JOHN BRIGGS & others *vs.* CITY OF BOSTON.

Suffolk. March 4, 1918. — May 23, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Eminent Domain. Boston Transit Commission. Damages, For property taken or impaired under statutory authority.

On a petition under St. 1902, c. 534, § 8, by the lessee of a certain building on Washington Street in Boston for damages sustained in the construction of the Washington Street tunnel, apart from the compensation for the taking, by reason of being deprived of the use of the basement of the building during a substantial period of time and compelled to remove his goods from the basement during such period, it appeared that the petition was filed more than a year after the taking (by the filing of such taking in the registry of deeds) of a horizontal section of the property, the upper plane of which was two inches above the floor of the basement as it then was, that the basement floor was removed and afterwards was replaced at a new level above the taking, when the petitioner resumed his occupancy of the basement, and that during a substantial period of time while the portion of the tunnel under the basement was being constructed the transit commission for the purposes of such work occupied the whole of the basement. There was no evidence that any property was "injured" as distinguished from having been "taken" within the meaning of the statute. *Held*, that the use of the portion of the space within the basement above the plane of the taking was a necessary incident of the taking, and that the right to damages for such use was barred, because the petition was not filed

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within one year after the property of the petitioner was "so taken or injured" within the requirement of § 8 of the statute.

PETITION, filed on June 4, 1907, under St. 1902, c. 534, § 8, by the lessees of the building numbered 14–16 on Washington Street in Boston for damages for the petitioners' loss of occupancy of the basement of that building and the cost of the removal of their goods therefrom by reason of the acts of the Boston transit commission in connection with the taking of a horizontal section of the property for the purpose of constructing the Washington Street tunnel.

The respondent's answer alleged that the petition was not brought within the time provided by statute for the bringing of petitions for the taking of property by the Boston transit commission, and that the petition was not brought in the manner and form provided by statute for the bringing of petitions to recover such damages as alleged, and further alleged that, if any property of the petitioners had been taken as set forth in the petition, it had been paid for in full.

In the Superior Court the case was tried before *Dana*, J. The facts shown by the evidence are stated in the opinion.

The petitioners contended that the occupation by the Boston transit commission of that part of the basement not included within the taking was a separate and distinct act by the transit commission affecting the property of the petitioners in that it prevented them from using and enjoying that portion of the premises not included within the taking, and that the transit commission by so depriving them of the use of that portion of their premises had caused an injury to their property within the meaning of St. 1902, c. 534, for which they were entitled to damages separate and distinct from any damages caused by the taking.

At the close of the evidence the petitioners asked the judge to rule as follows:

"1. On all the evidence the petitioners are entitled to recover.

"2. The entry upon and occupation of the premises under lease to the petitioners by the Boston transit commission in connection with the construction of the Washington Street tunnel, so called, under St. 1902, c. 534, was an injury to the property of the petitioners within the meaning of said chapter 534, for which they are entitled to compensation and for which the respondent is liable under the provisions of said chapter 534.

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"3. The petitioners' right of action for injury to their leasehold estate is separate and distinct from any right of action of the owners for the taking or injury of the owners' estate in the same premises.

"4. The petition in this case having been filed within one year from the time when the Boston transit commission began to occupy the petitioners' premises in connection with said tunnel construction, was seasonably filed under the provisions of St. 1902, c. 534."

The judge refused to make any of these rulings and ruled as follows:

"1. That the petition is not improperly brought by reason that it is brought in the name of the leaseholders.

"2. That the petitioners are not entitled to recover because the petition was not brought within one year from the date of taking.

"3. The petitioners, as matter of law, cannot recover any damages resulting from the taking of the land for the construction of the tunnel or any damages resulting as a necessary incident or consequence of such taking; that the occupation by the transit commission of the portion of the basement above the upper plane of the taking for the purpose of constructing the tunnel was incident to the taking and a consequence of it; and that all damage for such occupation of the premises above said plane of taking would be recoverable as damage consequent upon the taking."

The judge made the following finding of fact: "The petitioners suffered no appreciable injury by the occupation or use of the one hundred and eight square feet of the area of the basement not included within the lines of the taking. The judge found for the respondent; and the petitioners alleged exceptions.

B. Corneau, for the petitioners.

G. A. Flynn, for the respondent.

RUGG, C. J. This is a petition brought by the lessees of an entire building on Washington Street in Boston, to recover damages for the injury to a part of their leasehold estate by the Boston transit commission. In the building was a basement, which was used by the petitioners for storage purposes. By virtue of statutory authority, the transit commission took on May 17, 1906, the portion of this building lying between horizontal planes of division, the upper plane being approximately two inches above

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the basement floor as it then was. On June 15, 1906, the petitioners were notified by the transit commission to vacate the basement and to remove their goods therefrom, and they immediately complied with the notice. The respondent admits that the transit commission, for the purposes of the public work imposed on it of building a tunnel in Boston, occupied the whole of the basement for a substantial period of time. The basement floor was removed and replaced in the course of building the tunnel beneath the leased premises. Thereafter the petitioners resumed occupancy of the basement. In May, 1907, the present petitioners assigned to the owners of the estate, for a substantial consideration, their claims for damages arising by reason of the taking or by reason of any work done under or in connection therewith. The owners brought a petition to recover their damages and a settlement has been made of that claim.

The present petitioners now seek to recover damages for the loss of occupancy of their basement and the cost of the removal of their goods, contending that that is an injury to them outside of the taking. The main question is whether this petition was seasonably brought.

Ample power is conferred by St. 1902, c. 534, § 6, upon the transit commission to make whatever takings, qualified or in fee, are necessary to carry out the undertaking entrusted to them. It is provided by § 8 that petitions for the assessment of "damages sustained by any person by reason of property taken or injured by the commission under authority of this act" must be filed "within one year after such property is so taken or injured."

The allegations of this petition in effect are that the occupancy of the horizontal plane lying between the ceiling of the basement and the plane bounding the upper limit of the taking, which was two inches above the floor of the basement, was under the authority of the statute. It is manifest that the only right conferred upon the commission by the taking began when the instrument of taking was filed. The rights of the petitioners to damages, so far as they grow out of the taking either directly or incidentally, accrued on that date and are barred, because this petition was not filed until after the expiration of one year from the taking. If the use of the portion of the space within the basement which lay outside the plane of taking was a necessary inci-

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dent of the taking, then the right to damages is barred. If that use was not authorized by the act, then there is no remedy by petition under the act.

The petition does not set out any facts showing that property has been "injured" as distinguished from having been "taken," as these words are used in the act. Without discussing the nature of an injury to property, for which under the act a petition may be filed within one year thereafter, it is enough to say that the facts alleged in this petition fail to disclose that any property has been injured by the commission under the authority of the statute as distinguished from property injured by a taking or injured by acts outside the authority of the statute. See *Turner* v. *Gardner*, 216 Mass. 65, 71.

Exceptions overruled.

ROYAL P. BOTT'S (dependent's) CASE.

Suffolk. March 6, 1918. — May 23, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Workman's Compensation Act, Dependency. *Evidence*, Presumptions and burden of proof. *Words*, "Dependents."

A woman to whom an award is made under the workmen's compensation act as the dependent widow of a deceased employee is entitled to receive the payments during the whole of the period covered by the award if she lives so long, and her right to compensation does not cease by reason of her marriage before the expiration of the period to another man able and willing to support her.

In this case it was *pointed out* that in a claim under the workmen's compensation act by the alleged dependent widow of an employee, if the widow was living with her husband at the time of his death, the presumption created by St. 1911, c. 751, Part II, § 7 (*a*), that she was wholly dependent upon her husband's earnings for support, is made conclusive and cannot be affected by any proof of facts to the contrary.

APPEAL to the Superior Court under St. 1911, c. 751, Part III § 11, as amended by St. 1912, c. 571, § 14, from a decision of the Industrial Accident Board that Anna M. Morgan, formerly Anna M. Bott, to whom an award of $10 a week for a period of four hundred weeks from March 30, 1915, was made as the dependent widow of Royal P. Bott, an employee of the Otis Elevator Company, who died on April 10, 1915, as the result of an injury received

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in the course of his employment on March 30, 1915, continued to be entitled to such compensation until the termination of the period of the award, notwithstanding the fact of her marriage on June 16, 1916, to Albert W. Morgan, whose earnings were sufficient for the support of both of them.

The case was heard by *J. F. Brown*, J.

Before the Industrial Accident Board Anna M. Morgan, the claimant, testified that in April, 1915, her name was Anna M. Bott and she was the wife of Royal P. Bott, who was injured while in the employ of the Otis Elevator Company on March 30, 1915, and died on April 10, 1915. Before his injury she lived with him and they had no children. Since Bott's death, and up to the present time, she had received compensation at the rate of $10 a week from the insurer. Since Bott's death, or in June 16, 1916, she was married to Albert W. Morgan, with whom she had lived since. Morgan was and is a salesman in the employ of A. Storrs and Bement Company. When questioned as to Morgan's salary, the witness stated that she objected to answering because she did not think it necessary. She stated, however, that his salary was sufficient to support them both; and it had been since their marriage. She testified that she and Morgan lived at 19 Vassar Street, Dorchester, occupying one apartment of a three-story wooden structure. They had a telephone. She had no maid, and had no maid when she lived with Bott. She has never had any children. She stated that while she was living with Bott she worked every day as a bookkeeper, receiving a weekly wage of $13. She did not work because it was necessary for her support, but because she preferred it to housework. She was working at the time of Bott's injury. Between the time of Bott's death and the date of her marriage to Morgan she worked. After her marriage to Morgan she worked for a while, but she ceased working because Morgan objected so much. She does not work now. She stated that she does not spend the $10 a week compensation which she receives from the insurer at the present time for things that otherwise would be purchased by Morgan if she did not have the money, but she spends it for things which she would not ask him to buy for her.

The judge made a decree, in accordance with the decision of the Industrial Accident Board, that the new marriage of the

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claimant in no way affected her right to the compensation originally awarded to her. The insurer appealed.

G. Gleason, for the insurer.

No counsel appeared for the claimant.

RUGG, C. J. The question presented on this record is whether a woman, awarded compensation because she is the widow of an employee who lost his life from injuries arising out of and in the course of his employment by a subscriber under the workmen's compensation act, is barred from receiving further payments upon her remarriage. It is manifest from the facts found that in fact she is no longer dependent for her support upon the payments received under the act.

It was held in *Murphy's Case*, 224 Mass. 592, that the right to payments under the act was not vested, and ceased upon the death of the dependent. But that decision does not reach to the point here raised. Its reasoning in brief was that there was no provision in the act for payment to be made to anybody save to the dependents therein named, and nothing to indicate a purpose that the payments be made to the personal representatives of dependents in case of their death, and that to treat the right to such payments as passing to their executors or administrators often would or might result in payments to persons in no way connected with the deceased employee or his family or kindred, and this might deprive some of his kindred in truth dependent upon his wages for support of any payment under the act. The practical justice of that decision is illustrated by *Bartoni's Case*, 225 Mass. 349, 354. The word "dependents" as matter of construction did not seem rationally susceptible of including their personal representatives in case of their death, in view of the context of the act and its general purpose. That reasoning does not apply to the case at bar. Here no question of construction of the words of the act is involved. It is provided that the payments shall be made to the dependents as therein defined. There is no doubt that the widow came within that descriptive word. The ascertainment of dependents is made as of the time of the injury to the deceased employee. It cannot be made as of any other time. St. 1911, c. 751, Part II, § 6, as amended. The widow was wholly dependent upon the deceased employee, her husband, at that time, by the conclusive presumption of the act, because she was living with him. § 7, as amended.

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No provision is made by the act for inquiry into any subsequent change in her condition of dependency. She may become heiress to a fortune after his death and thus be utterly independent of the payments provided by the act. But there is no provision for an adjudication of that fact. If such an event should occur, it would be immaterial so far as concerns any procedure under the act. The act provides that the stated payments shall be made to her during the period covered by the award except in the event of her death. Whatever incongruity there may be in continuing payments to a person on the presumption that she is dependent on a deceased husband when in fact she is receiving ample support from a new husband, is a matter for the Legislature and not for the courts to remove.

Decree affirmed.

GLENEIDA L. CHAPLIN *vs.* BROOKLINE TAXI COMPANY.

Suffolk. March 6, 1918. — May 23, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Negligence, Contributory.

Where, after the passage of St. 1914, c. 553, a woman, who was about to cross on foot a street thirty feet wide much used by motor cars, stood on the edge of the sidewalk at a point where a curve in the road prevented her from seeing more than fifty feet and looked in both directions and then waited for two motor cars going in opposite directions to pass, and after that looked again in both directions and, seeing no motor car coming from either direction and hearing no warning signal, took five or six steps and was knocked down and rendered unconscious by a motor car going at the rate of twenty-five miles an hour which struck her before she saw it, it cannot be ruled that she was negligent as matter of law, and in an action against the owner of the car for her injuries thus sustained, in which the defendant has alleged in his answer that the plaintiff's injury was the result of her own negligence, she is entitled to go to the jury upon the question of her due care with the burden upon the defendant to prove affirmatively contributory negligence.

TORT for personal injuries sustained on Easter Sunday, April 23, 1916, by being knocked down by a motor car of the defendant driven negligently by a servant of the defendant on Beacon Street in Brookline near Jordan's Steps. Writ dated June 2, 1916.

The answer, besides a general denial, contained an allegation that, if the plaintiff received the injuries alleged, they were the result of her own negligence and of her failure to exercise due care.

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In the Superior Court the case was tried before *Sisk*, J. It was admitted at the trial that there was evidence of negligence on the part of the defendant. The evidence on the issue of contributory negligence on the part of the plaintiff is described in the opinion. On this issue the defendant asked for rulings numbered from nine to thirteen inclusive, which the judge refused to make except so far as they were covered by his charge to the jury. The rulings numbered from nine to twelve inclusive are held by this court to have been covered fully and accurately by the charge. The thirteenth ruling requested by the defendant was as follows:

"13. Upon all the evidence there is nothing to justify a finding that the plaintiff was in the exercise of due care; if the driver was not negligent the plaintiff cannot recover even though the brakes were defective. There is not sufficient evidence to warrant a finding that the accident was solely attributable to the negligence of the driver rather than to the plaintiff's own negligence."

The judge refused to make this ruling. The jury returned a verdict for the plaintiff in the sum of $1,750; and the defendant alleged exceptions.

P. H. Kelley, for the defendant.

W. S. McCallum, for the plaintiff.

CROSBY, J. This is an action to recover for personal injuries received by the plaintiff by reason of being struck by a motor car of the defendant, driven by its employee. It is conceded that there was evidence of the defendant's negligence.

The circumstances attending the accident may be briefly stated: The plaintiff, who was walking ahead of her companion, reached the sidewalk on Beacon Street in Brookline at a point where the street was thirty feet in width. She testified that she stood on the edge of the sidewalk about five or ten seconds and looked in both directions; that she waited for two motor cars going in opposite directions to pass, again looked toward Coolidge Corner, then toward Washington Square, and, not seeing any motor car coming from either direction, stepped off the sidewalk and took five or six steps and was struck, knocked down, and rendered unconscious; that she heard no warning signal and did not see the motor car which struck her; that it came from the direction of Coolidge Corner. She further testified that, in looking toward Coolidge Corner from the place where she attempted

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to cross the street, her view was obstructed on account of the grade and a curve in the street which prevented her seeing a distance of more than fifty feet. The jury viewed the locality in the vicinity of the accident.

The accident occurred about 7:30 o'clock in the evening of April 23, 1916. It could have been found that the motor car was travelling at the rate of not less than twenty-five miles an hour when it struck the plaintiff, and that she was thrown ten or fifteen feet. It is plain that upon the evidence and from the view taken by the jury, it could not have been ruled that the plaintiff was lacking in due care. This question was for the jury with the burden upon the defendant to prove affirmatively contributory negligence. St. 1914, c. 553. *Bullard* v. *Boston Elevated Railway*, 226 Mass. 262. *French* v. *Mooar*, 226 Mass. 173. *Creedon* v. *Galvin*, 226 Mass. 140.

The defendant excepted to the refusal of the presiding judge to give its requests numbered nine to thirteen inclusive. Without referring to these requests in detail, but after careful consideration, we are of opinion that those numbered nine to twelve inclusive were fully and accurately covered by the judge's charge, so far as they properly could have been given. The thirteenth request was rightly refused. Whether upon evidence which was conflicting the plaintiff was in the exercise of due care, was as above stated a question for the jury.

As the trial appears to have been conducted without error, the entry must be

Exceptions overruled.

SAMUEL GOODMAN *vs.* IDA W. TELFER.

Suffolk. March 7, 1918. — May 23, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Deed, Construction. *Covenant*, Of warranty.

In an action of contract on a covenant of warranty in a deed to the plaintiff from the defendant to recover the amount of expenses incurred by the plaintiff in procuring the registration in the Land Court of his title to the parcel of land purchased by him from the defendant, a married woman, and conveyed by the deed containing the covenant of warranty, it appeared that the defendant had acquired title to the land by a deed which recited that the consideration was

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paid by her, that in the granting clause the word "said" was followed by the name of her husband, the name of the wife only having been mentioned previously, while the habendum clause ran to her by name and "his" heirs and assigns. *Held*, that the plaintiff was not entitled to recover on the warranty, because the defendant's title was clearly good, the intention of the parties to vest the title in the defendant being made clear by the recital that the consideration had been paid by her.

In the same case it was *held* that the manifest clerical error of writing "his" instead of "her" in the habendum clause did not affect the validity of the conveyance.

A deed conveying land is to be construed so as to vest the title in accordance with the intention of the parties as it appears from the whole instrument unless this is contrary to established principles of law.

CONTRACT on a covenant of warranty to recover the sum of $100 alleged to have been expended by the plaintiff in procuring the registration in the Land Court of the plaintiff's title to a parcel of real estate numbered 148 on Townsend Street in the part of Boston called Roxbury, which was conveyed to the plaintiff by the defendant by a warranty deed and was alleged not to have given the plaintiff a good title to the property until the title was perfected by such registration in the Land Court. Writ in the Municipal Court of the City of Boston dated October 16, 1917.

In the Municipal Court the case was submitted upon an agreed statement of facts, containing the facts which are stated in the opinion.

The essential part of the deed of Conant to the defendant dated June 16, 1906, mentioned in the opinion, was stated in the agreed statement of facts contained in the report of the Municipal Court to be as follows:

"I, George C. Conant in consideration of one ($1) dollar and other valuable considerations paid by Ida B. Wyman, the receipt of which is acknowledged, do hereby remise, release and forever quitclaim unto the said David C. Wyman and his heirs and assigns, the premises in question, 148 Townsend Street, Boston.

"To Have and to Hold the granted premises with all the privileges and appurtenances thereto belonging to the said Ida B. Wyman and his heirs and assigns to their own use and behoof forever."

The judge found for the plaintiff for the full amount claimed, and at the request of the defendant reported the case to the Appellate Division.

The Appellate Division made an order vacating the finding and ordering judgment for the defendant. The plaintiff appealed.

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A. S. Emerson, for the plaintiff.

J. E. Eaton, E. T. McKnight & S. W. C. Downey, for the defendant, submitted a brief.

CROSBY, J. This is an action to recover the expenses incurred in registering in the Land Court the title of a parcel of real estate purchased by the plaintiff from the defendant. The case is before us upon an agreed statement of facts, from which it appears that the real estate was conveyed to the plaintiff by the defendant by warranty deed, subject to a mortgage thereon for $9,000; that the defendant obtained title to the premises from one Conant by a deed dated June 16, 1906, which recited that the consideration was paid by Ida B. Wyman (the former name of the present defendant) but the granting part ran to "the said David C. Wyman and his heirs and assigns," only Ida B. Wyman having been mentioned previously, while the habendum was to Ida B. Wyman and "his" heirs and assigns. Afterwards, on July 21, 1906, Conant executed and delivered to the defendant another deed of the same premises "for the purpose of correcting clerical errors in the granting clause of said prior deed." It also is agreed that the plaintiff has failed to obtain a deed of release from David C. Wyman, although the latter has not disturbed him in his possession of the premises.

The plaintiff contends that, although he obtained a marketable title, he is entitled to recover, because of the covenant of warranty, the expenses incurred in having the title registered. We are unable to agree with this contention.

The first deed from Conant to the defendant, while inartificially drawn, vested in her as matter of law a good title to the premises conveyed. A conveyance of land is to be construed so as to vest the title in accordance with the intention of the parties, if such interpretation is not contrary to established principles of law. The consideration for the grant was paid by the defendant, and the habendum to her and "his" heirs and assigns clearly shows that it was intended that the premises were to be conveyed to her. The word "his" instead of "her" manifestly was a clerical error which does not affect the validity of the grant. The habendum explains the granting clause, and as the consideration was paid by the defendant it is plain it was the intention of the parties that the title should vest in her. *Bridge* v. *Wel-*

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lington, 1 Mass. 219. *Pratt* v. *Sanger*, 4 Gray, 84, 86. *Chenery* v. *Stevens*, 97 Mass. 77. *Breed* v. *Osborne*, 113 Mass. 318. *Tibbetts* v. *Leeson*, 148 Mass. 102.

Judgment is to be entered for the defendant. St. 1913, c. 716, § 3.

So ordered.

ALBERT S. WOODWORTH *vs.* ANDREW G. FULLER.

Essex. March 8, 1918. — May 23, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Set-off. Practice, Civil, Verdict, New trial.

Where a defendant in an action of contract files a declaration in set-off setting forth a claim which is a proper subject of set-off, he has a right to a determination of the question, whether he is entitled to recover the whole or any part of his claim.

Where such an action is referred to an auditor who finds for the plaintiff in the main action and that there was no right of recovery upon the declaration in set-off, and the case thereafter is tried before a jury, the auditor's report being introduced in evidence, if the jury find for the plaintiff in the sum found by the auditor with interest, this, in the absence of any specific finding upon the declaration in set-off, will not warrant the inference that the jury also intended to adopt the auditor's other finding and to deny recovery upon the declaration in set-off.

Where, after the rendering of a verdict in such an action which does not include a finding upon the declaration in set-off, the defendant files a motion for a new trial on the ground that the jury, "in assessing said verdict, did not make a finding upon the declaration in set-off," the judge is not warranted in denying the motion on the ground that he is "convinced that they [the jury] intended to follow the reports of the auditor, and to find for the defendant in set-off, and believed they accomplished this end by reporting simply a verdict for the plaintiff in the main action."

CONTRACT for personal services during the years 1901 to 1904, inclusive, and for money lent. Writ dated September 6, 1910.

The defendant in his answer set up a general denial, payment and the statute of limitations, and also filed the declaration in set-off described in the opinion, to which the plaintiff answered by alleging a general denial, payment and the statute of limitations.

The case was tried before *Wait*, J. The course of the trial, so far as material to these exceptions, is described in the opinion.

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A motion of the defendant for a new trial and the judge's ruling thereon also are described in the opinion.

Being of opinion that the correctness of his ruling upon the motion for a new trial ought to be determined by this court, the judge reported the case with the stipulation that, if the ruling was erroneous, the case was to be remanded to the Superior Court for a new trial upon all the issues; otherwise, judgment was to be entered for the plaintiff upon the verdict.

R. L. Sisk, for the defendant.

J. J. Ronan, for the plaintiff.

CROSBY, J. This is an action of contract brought to recover $1,600 for services rendered to the defendant. The defendant filed a declaration in set-off claiming $6,624 from the plaintiff for board and lodging. The case was referred to an auditor who found for the plaintiff in the sum of $300; and, upon the case being recommitted to him, found that the defendant was not entitled to recover upon his declaration in set-off.

The case afterwards was tried before a jury who returned a verdict for the plaintiff in the sum of $435.54, but returned no verdict upon the defendant's declaration in set-off. The defendant filed a motion for a new trial upon certain grounds and because the jury "in assessing said verdict, did not make a finding upon the declaration in set-off." The presiding judge heard the motion without the introduction of any evidence, and made the following ruling: "In the case No. 10687 the jury, by inadvertence I am satisfied, returned no verdict on the defendant's declaration in set-off. I am convinced they intended to follow the reports of the auditor, and to find for the defendant in set-off; and believed they had accomplished this end by reporting simply a verdict for the plaintiff in the main action." The motion was denied; and the case is before us on a report of the judge which raises the question of the correctness of the foregoing ruling.

Where, as in this case, a defendant files a claim which properly is the subject of set-off, he is entitled to a determination of the question whether he may recover the whole or any portion thereof; and it is provided in part by R. L. c. 174, § 11, that "Judgment in an action in which a declaration in set-off has been filed shall be rendered in favor of the party to whom a balance is found due for

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the amount of such balance, not exceeding the jurisdiction of the court. . . ."

The plaintiff, however, contends that the ruling of the judge shows that the jury passed upon the defendant's claim in set-off, that the finding for the plaintiff is the amount found due by the auditor, with interest, and that the jury accordingly found against the defendant's claim in set-off.

The report states that the auditor's reports were introduced in evidence at the trial, together with other evidence offered by both parties. The record does not expressly show that the defendant's declaration in set-off was considered by the jury, nor can such action on their part be inferred; there is nothing before us to show that they intended to follow the reports of the auditor, aside from the fact that the verdict equalled the amount of his finding, with interest.

If it be assumed from the finding that the jury were satisfied that the plaintiff was entitled to recover upon his declaration the amount found due by the auditor, it does not appear that they passed upon the defendant's claim, or, if they considered it, that they arrived at any decision respecting it. They may by inadvertence or oversight have failed to include it in their deliberations, or they may have failed to agree upon it. In the absence of any questions put to the jury or of any statement made by them when the verdict was returned, it does not seem to us it could properly have been ruled that they intended to find against the claim filed in set-off; the defendant is entitled to have his alleged cause of action determined.

The case of *Dooley* v. *Murphy*, 229 Mass. 72, cited by the plaintiff, is clearly distinguishable from the case at bar. That case was tried by a judge without a jury; and it plainly appeared that his attention was directed to the declaration in set-off and that it was passed upon by him.

The case of *Parent* v. *Smith*, 160 Mass. 314, also cited by the plaintiff, is not at variance with the conclusion reached in the present case.

In accordance with the terms of the report, a new trial is to be had in the Superior Court upon all the issues.

So ordered.

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MERRILL E. FRENCH *vs.* BOSTON AND MAINE RAILROAD.

Middlesex. March 8, 1918. — May 23, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Negligence, Invited person, Railroad, At railroad station.

One, who is under contract with the federal government to carry mail from mail trains at a certain railroad station to a post office near by, is not a trespasser nor a mere licensee while passing from a train upon a siding from which he has taken mail along a cinder walk between the siding and the main track to go to the platform of the station, where it appears that it was customary for the mail train to stop and discharge mail, express matter and passengers on the siding and that he with the knowledge of the railroad corporation was accustomed to receive the mail there and to cross the intervening track to the station platform.

In front of a certain railroad station, beyond and parallel to the main track, which ran east and west, there was a siding with a switch connecting it with the main track beyond each end of the station, the siding west of the station being about three hundred seventy-five feet distant and about three hundred feet beyond an overhead concrete bridge. Two trains were due at the station at the same time, one from the east carrying mail, express matter and passengers to be there discharged, and one from the west not taking mail, express matter or passengers at the station. On a certain day before the enactment of St. 1914, c. 553, the train from the east, as was usual, arrived first and, as was customary under those circumstances, took the siding, the mail car when stopped being west of the station platform. The custom was for the train from the west, if it arrived in the meantime, to stop west of the first switch and wait there until the first train had discharged mail, express matter and passengers. Between the siding and the main track was a space nine feet wide which, with the space between the rails of the main track, was filled with cinders levelled to the height of the rails. After a carrier of mail had received the mail from the train from the east, he looked toward the west and no train was in sight. He then turned round and, pushing a wheelbarrow carrying the mail, started along the space between the tracks toward the station platform, and, before he reached the platform, upon hearing some one shout, saw the train from the west ten feet from him. The wheelbarrow was struck by the train and he fell between the tracks and was injured. The train from the west was running at the rate of thirty miles an hour. At the trial of an action by the mail carrier against the railroad corporation for his injuries, upon evidence tending to prove the foregoing facts, it was *held* that findings were warranted that the plaintiff was in the exercise of due care and that the engineer of the train from the west was negligent.

The plaintiff in the action above described was entitled to rely to a certain extent upon the custom, which could have been found to exist and of which he had knowledge, that the train from the west under the circumstances should wait beyond the switch until the train upon the siding had discharged mail, express

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matter and passengers and until those obliged to cross the main track had had an opportunity to reach a place of safety.

It would not have been proper in the action above described to have ruled as a matter of law that the plaintiff was negligent in not having looked a second time toward the west in travelling the distance of fifteen or twenty feet from the west bound train to the place where he was injured.

TORT for personal injuries received when the plaintiff, who was employed by the United States to receive the mail at the defendant's station at Weston, was run into by one of the defendant's railroad trains. Writ dated February 19, 1916.

In the Superior Court the case was tried before *Morton*, J. The material evidence is described in the opinion. At the close of the evidence the judge ordered a verdict for the defendant and, by agreement of the parties, reported the case for determination by this court, judgment to be entered upon the verdict for the defendant if his ruling was correct, and, if it was wrong, judgment to be entered for the plaintiff in the sum of $400.

A. T. Johnson, for the plaintiff.

J. M. O'Donoghue, for the defendant.

CROSBY, J. There was evidence that the plaintiff had a contract with the federal government to carry the mail from mail trains, when they arrived at the railroad station in Weston, to the post office in that town. He had rendered this service under similar contracts for about thirty years before January 31, 1914, when he was struck by an engine of the defendant and received the injuries for which this action is brought.

The defendant maintains a single track in Weston, which runs east and west, the station being on the southerly side. Opposite the station — north of the main track — there is a long siding with a switch at each end so that approaching trains can pass each other at this point. A platform in front of the station, eight or ten feet wide, extends to within about two feet of the southerly rail of the main track; and the space between the northerly rail of the main track and the southerly rail of the siding — a distance of approximately nine feet — is filled in with cinders almost level with the tops of the rails.

At the time of the accident there was a mail train from Boston due to arrive at the station about 6:11 o'clock in the evening; and it was the practice to discharge the mail and express matter and to allow passengers to leave and enter the train. There was

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also a train for Boston due to arrive at Weston at the same time. The train from Boston, as was usual, arrived first, in which event it was the practice for the train bound for Boston to stop near a switch about three hundred and seventy-five feet west of the station and wait there until the mail and express matter had been removed and the passengers had alighted. The train from Boston took the siding, and came to a stop with the engine underneath an overhead concrete bridge about seventy-five feet west of the station and the forward end of the car containing the mail and express matter at about the easterly face of the bridge. When this train arrived the train for Boston was not in sight. The plaintiff testified that he went to the door of the mail car with a wheelbarrow which he used to carry the mail, turned it round, and placed the mail pouches in it; that he then turned round and looked up the main track, and, the train for Boston not being in sight, started to go to the station platform walking between the main track and the siding; that he went fifteen or twenty feet with his back toward the west, then turned to cross the main track to go upon the platform when he heard some one shout, and saw the train for Boston coming toward him, and about ten feet away; that the wheelbarrow was struck by the engine, and he was knocked down and fell between the two trains; that at that time the train from Boston was standing still or was just starting. There was evidence that the train which struck the wheelbarrow was running at the rate of thirty miles an hour.

Upon this evidence it could not have been ruled that the plaintiff was a trespasser, or merely a licensee, while between the tracks. But it could have been found that he was there rightfully, — at a place where he was required to be in the performance of his duties in receiving the mail from the train, — and in accordance with a practice which existed respecting the discharge of mail from the train and of which the defendant had knowledge. *Turner* v. *Boston & Maine Railroad*, 158 Mass. 261, 263. *Kilburn* v. *New York, New Haven, & Hartford Railroad*, 218 Mass. 493. *Joyce* v. *Boston, Revere Beach & Lynn Railroad*, 219 Mass. 476. *Palmer* v. *Boston & Maine Railroad*, 227 Mass. 493, 497.

The question whether the plaintiff was in the exercise of due care also was for the jury. As the cause of action arose before St. 1914, c. 553, went into effect, the statute is not applicable.

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While the plaintiff was in a place of danger and was bound to exercise reasonable diligence to protect himself from harm, still he was entitled to rely to a certain extent upon the practice which could have been found to exist, and of which he had knowledge, — that the engineer of the train bound for Boston would stop at the switch west of the station until the express matter and mail had been removed and the passengers had alighted, and that he would not operate his train at such a rate of speed as would endanger the safety of those who were obliged to cross the main track from the train on the siding to the station platform. *Conry* v. *Boston & Maine Railroad,* 227 Mass. 411. *Hines* v. *Stanley G. I. Electric Manuf. Co.* 199 Mass. 522. *Flaherty* v. *New York Central & Hudson River Railroad,* 211 Mass. 570.

It could not have been ruled as matter of law that the plaintiff was careless because he did not look a second time in travelling a distance of fifteen or twenty feet from the car to the place where he was injured. *Manley* v. *Bay State Street Railway,* 220 Mass. 124, 128.

There was evidence which would have warranted a finding that the engineer did not bring his train to a stop in accordance with a practice which could have been found to exist; or, that if he did stop, that he again started and ran his train at an unreasonable rate of speed past the station at a time when passengers and others were invited to cross the main track. Either finding would be evidence of negligence. *Conry* v. *Boston & Maine Railroad, supra. Hines* v. *Stanley G. I. Electric Manuf. Co. supra. Hicks* v. *New York, New Haven, & Hartford Railroad,* 164 Mass. 424.

In accordance with the terms of the report, judgment is to be entered for the plaintiff in the sum of $400, as damages.

So ordered.

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N. E. BATES *vs.* DANIEL CASHMAN.

Essex. March 13, 1918. — May 23, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, & PIERCE, JJ.

Contract, Rescission. *Fraud. Deceit. Equity Jurisdiction*, Specific performance. *Estoppel.*

A person seasonably may rescind a contract which he has been induced to enter into in reliance upon false, though innocent, misrepresentations respecting a cognizable material fact made as of his own knowledge by the other party to the contract.

It is fraud for one in negotiations leading to the making of a contract to state a fact as true of his own knowledge when he has no such knowledge.

A suit for the specific performance of a contract to purchase capital stock and bonds of a corporation cannot be maintained where it appears that the defendant was induced to make the contract by false, though innocent, misrepresentations respecting a cognizable material fact made as of his own knowledge by the plaintiff.

A defendant in a suit in equity for the specific performance of a contract is not estopped to rely upon one good defence, among others urged, merely because he has not always put it forward, where it does not appear that he has acted dishonestly in presenting his reasons for declining to perform the contract or that the plaintiff has been misled to his harm.

BILL IN EQUITY, filed in the Supreme Judicial Court on January 13, 1916, and afterwards amended by the filing of a substituted bill, seeking specific performance of a contract to purchase the capital stock and bonds of the Newbury Cordage Company.

The suit was referred to a master, who filed a report to which both parties filed objections and exceptions. The material findings of the master are described in the opinion. The suit was reserved by *Braley*, J., for determination by this court upon the pleadings, the master's report and the exceptions thereto.

R. W. Hale, for the plaintiff. *J. M. Maguire*, who prepared the brief, was absent on public service connected with the war.

E. Foss, for the defendant.

RUGG, C. J. This is a suit to recover for the breach of a written contract to buy the stocks and bonds of the Newbury Cordage Company of Newburyport. The securities were the means by which to convey control of land with a factory and machinery.

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There is no controversy that the contract was made. The defendant contends that he was induced to sign it by such false representations by the plaintiff as release him from obligation to perform. The case was referred to a master. It is reserved upon his report, with exceptions thereto and the pleadings. There is no report of evidence.

It has been found that during the negotiations preceding the contract the plaintiff represented that a right of way, which was a substantial factor of value in the real estate, was owned by the Newburyport Cordage Company and could not be interfered with. This representation was untrue. The plaintiff did not know that it was untrue. The defendant relied upon it and would not have signed the contract if he had known that it was false. A person seasonably may rescind a contract which he has been induced to enter into in reliance upon false though innocent misrepresentations respecting a cognizable material fact made as of his own knowledge by the other party to the contract. The fraud in such a representation consists in stating as a fact that which is not known positively to be a fact. It is no excuse for making such a statement as of one's own knowledge that it was believed to be true or that the true state of affairs had been forgotten. It is fraud to state a fact as true of one's own knowledge when he has no such knowledge. "This rule has been steadily adhered to in this Commonwealth, and rests alike on sound policy and on sound legal principles." *Chatham Furnace Co.* v. *Moffatt*, 147 Mass. 403, 404. *Litchfield* v. *Hutchinson*, 117 Mass. 195. *Goodwin* v. *Massachusetts Loan & Trust Co.* 152 Mass. 189, 202. *Adams* v. *Collins*, 196 Mass. 422. *Huntress* v. *Blodgett*, 206 Mass. 318, 324. *Kerr* v. *Shurtleff*, 218 Mass. 167, 171, 172.

In view of the express finding of fact by the master, this principle of law is decisive against the right of the plaintiff.

The defendant is not prevented from setting up this defence. Although he wrote respecting other reasons for declining to perform the contract, he expressly reserved different grounds for his refusal. While of course one cannot fail in good faith in presenting his reasons as to his conduct touching a controversy, he is not prevented from relying upon one good defence among others urged simply because he has not always put it forward, when it does not appear that he has acted dishonestly or that the other

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party has been misled to his harm, or that he is estopped on any other ground. See in this connection *Randall* v. *Peerless Motor Car Co.* 212 Mass. 352, 376.

It is not necessary to consider the other points which have been argued.

Bill dismissed with costs.

FRANK W. LARRIVEE *vs.* CHIEF OF POLICE OF NEWTON & another.

Middlesex. March 14, 1918. — May 23, 1918.

Present: RUGG, C. J., DE COURCY, CROSBY, & CARROLL, JJ.

Police. Municipal Corporations. Resignation. Mandamus.

Where a police officer of a city, who had been fined after hearings upon charges of neglect of duty, was summoned before the chief of police of the city and a captain of police and, as a consequence of a conversation then had, signed and delivered to the chief of police a written tender of his resignation as a member of the police force of the city "to take effect on its acceptance by the chief of police," such tender of a resignation, even if valid originally, can only be construed as intended to be open for acceptance for a reasonable time.

An acceptance of such a tender of a resignation more than six years after it was delivered is ineffectual, and after such an acceptance the officer may maintain a petition for a writ of mandamus to compel his restoration to the police force.

PETITION, filed on December 27, 1917, for a writ of mandamus to compel the restoration of the petitioner to the police force of the city of Newton.

The case was heard by *Braley*, J. The evidence is described in the opinion. At the close of the evidence the single justice refused to rule, as requested by the respondents, that on all the evidence the petition should be dismissed, and ordered the issuance of the writ. The respondents alleged exceptions.

E. B. Bishop, for the respondents.

G. H. Mellen, for the petitioner, submitted a brief.

RUGG, C. J. The petitioner, after serving a probationary period, was appointed a police officer of the city of Newton in 1908. In 1910 and again in 1911 charges for neglect of duty were preferred against him and, after hearing, he was fined. After the

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last hearing he was summoned before the chief of police and a captain of police. As a consequence of conversation then had, on August 14, 1911, he signed and delivered to the chief of police a written tender of his resignation as a member of the Newton police force "to take effect on its acceptance by the Chief of Police." The latter official testified that at the time the resignation was given "he said to the petitioner that he was not satisfied with his conduct, that he wanted his resignation to hold over him, that if he behaved himself it could be given back to him, but that if he did not, the chief would accept it at any time." In 1912 the petitioner again, after a hearing, was fined for neglect of duty. There was testimony that at least on one occasion after August 14, 1911, the chief of police warned the petitioner that he had his resignation and that, if the latter did not behave himself, it would be accepted. On November 6, 1917, some facts were presented to the chief of police, the nature of which did not appear, but he thought they warranted the acceptance of the resignation. He indorsed upon the paper an acceptance and notified the petitioner that he was no longer a police officer. The latter surrendered his equipment on November 9 and on December 27 following brought this petition for a writ of mandamus to be reinstated. The defendants, who are respectively the chief of police and mayor of the city of Newton, at the conclusion of the hearing requested the single justice to rule that as matter of law the petition should be dismissed. Their exception to the denial of this request brings the case here. The civil service law applies to members of the police force of Newton.

It is plain that there was no error of law in refusing to grant the ruling requested.

There is strong ground for the contention that it is contrary to the spirit of the civil service law to use a resignation of one, entitled to the protection and subject to the obligations and penalties of that law, for any such purpose as here is disclosed. But without determining that question, the case may be decided on another ground.

It well may have been found as a fact by the single justice that, if the resignation ever had any vitality, it had been lost completely by the efflux of time. That seems an almost irresistible inference from the circumstances. If the resignation be treated as

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valid originally, it can be construed only as intended to be open for acceptance for a reasonable time. There is no pretence that it was accepted until more than six years after its delivery. That was not within a reasonable time.

Exceptions overruled.

JOHN J. MORRISSEY *vs.* BOSTON AND MAINE RAILROAD.
SAME *vs.* ALBERT W. PIKE & others.

Suffolk. March 15, 1918. — May 23, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Negligence. Of owner or contractor toward employee of another contractor in construction of building, Invited person, Licensee.

A railroad corporation which has made contracts with various persons for doing different parts of the work of constructing a steel framed building upon its land for its uses, the work to be done by the contractors exclusively although under the direction and control and to the satisfaction of the chief engineer of the railroad corporation, whose decision as to the true construction and meaning of the drawings and specifications was to be final, cannot be held liable in an action against it for personal injuries suffered by an employee of one of the contractors and due to his falling by reason of the turning of an unfastened purlin which he took hold of as he was descending a ladder while assisting in straightening a truss which an inspector, acting for the chief engineer of the railroad corporation, had determined was not placed in accordance with the drawings and specifications.

In such an action, the mere facts, that the inspector of the defendant, in reply to an inquiry by the foreman under whom the plaintiff worked as to where spikes could be obtained to use in carrying out the straightening of the truss, replied, "There is lots of them up on the roof," and that the plaintiff thereupon was ordered by the foreman to go to the roof for the spikes, whence he was returning when he fell from the ladder, will not warrant a finding that the defendant was engaged in any way in the work being done when the plaintiff was injured.

If one of the contractors, not the plaintiff's employer, in the construction of the building above described, had placed a ladder against the side of the building, which the plaintiff used in going to the roof when the foreman ordered him to do so, such contractor cannot be said to have invited the plaintiff to use the ladder for his purposes, and, in an action by the plaintiff against such contractor, the plaintiff must be treated at best as a licensee of the defendant.

Where, in an action by the same plaintiff against such contractor for the personal injuries above described, it appears that the building still was in an unfinished state, that in some parts of the building purlins were on edge as they would be

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if bolted into position, while others were lying flat on the struts, some of which the plaintiff walked over in passing along between the ground and the roof, that the plaintiff was an experienced structural iron worker and that he knew that, in working in a place high above the ground it was necessary to be careful, it cannot be held that the defendant owed to the plaintiff any duty as to the purlin, the turning of which caused his fall, nor that the purlin in the condition and position in which it was constituted a trap.

TWO ACTIONS OF TORT for personal injuries received when the plaintiff fell from a building being erected for the defendant in the first action by contractors for different parts of the work, among whom were the McClintic, Marshall Company, the plaintiff's employer, and the defendants in the second action. Writs dated July 3, 1913.

In the Superior Court the cases were tried together before *Dana*, J. The material evidence is described in the opinion. At the close of the evidence, the judge ordered a verdict for the defendant in each case and reported the cases to this court for determination, the parties agreeing that, if the judge's rulings were right, judgments were to be entered on the verdicts; if the ruling was wrong in either case and not in the other, judgment was to be entered for the defendant in the case in which the ruling was correct and for the plaintiff in the other case in the sum of $4,000 and interest, and, if the rulings were wrong in both cases, judgment was to be entered for the plaintiff in each case for $2,000 and interest.

W. H. Shea, (*M. J. O'Leary* with him,) for the plaintiff.

A. R. Tisdale, for the defendant Boston and Maine Railroad.

C. S. Knowles, for the defendants Pike and others.

CROSBY, J. These are two actions of tort, tried together, to recover for personal injuries received by the plaintiff by falling from a building in process of construction on land of the first named defendant. At the close of the evidence for the plaintiff, the presiding judge directed a verdict for the defendant in each case and reported the cases to this court with a stipulation as to damages.

The first named defendant entered into written contracts with different contractors for the erection of the building; the contract for the steel framework was made with the McClintic, Marshall Company, by whom the plaintiff was employed; and the contract for the masonry and carpenter work was made with the defend-

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ants in the second action, William N. Pike and Sons, (hereinafter called Pike and Sons). The building was about two hundred feet long and about one hundred and fifty feet wide, and lengthwise ran approximately north and south; the walls were of brick on a concrete foundation and were about twenty feet in height; the frame of the building consisted of seventy-five-foot steel girders, which rested on the outer and inner brick walls and upon steel columns and ran across the building about thirty feet apart; lengthwise of the building and bearing upon the girders were trusses, or steel beams called struts; on the struts were steel angle irons, to which were bolted wooden purlins or rafters extending crosswise, and upon which the roof boards were nailed; a brick wall running north and south through the centre divided the building into two sections,—that on the east side was known as the car machine shop and that on the west the car blacksmith shop.

The steel framework had been erected by the McClintic, Marshall Company several days before the accident which caused the plaintiff's injuries, and the roof on the westerly half of the building had been completed by Pike and Sons, but the easterly half of the building had been only partially finished by the company and the roof had not been built; the ends of the steel struts had been set in mortar into the brick wall of the south end, and rested on steel plates.

Sometime before April 21, 1913, (the date of the accident,) one Coffin, an assistant engineer and inspector for the railroad company, noticed that the truss at the south end of the car machine shop was out of alignment; and the chief engineer of the McClintic, Marshall Company was notified to straighten it. Coffin also ordered Pike and Sons to remove the brickwork around the ends of the struts so that the truss could be pulled into place, and to remove the bolts which fastened the purlins to the steel work; there was evidence that these bolts were removed before the accident but that previously the purlins had been bolted to the trusses; there also was evidence that it was not necessary to remove the bolts to straighten the truss.

On the day of the accident the plaintiff and some other workmen under the direction of one Houston, foreman for the McClintic, Marshall Company, came to the building to straighten the truss. When they arrived they found a mason's ladder, which had been

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placed by employees of Pike and Sons on the east side of the junction of the strut and truss, at the place where the truss was bent and on its southerly side. The plaintiff and one Coppenrath went up the ladder and fastened a guy wire around the top of the truss at the point of the bend and fastened the guy to clamps; then went down the ladder and attached the guy to the railroad track, under the direction of Houston; while so engaged the guy wire began to slip, and Houston inquired of one Caswell, a steel inspector for the railroad company, where they could get some spikes to nail a plank to the ties to prevent the guy from slipping, and Caswell replied: "There is lots of them up on the roof." Houston then ordered the plaintiff to go up on the roof and get the spikes. The latter testified that he went up the ladder and after getting the spikes came back to go down the ladder and walked along a strut, that he saw a purlin standing on edge, the bottom of which was about twenty-four inches above the top of the ladder; that he saw the bolt head on the wood side; "that he put his two hands on the purlins to step on the ladder; that when he took his feet off the I-beam truss to step on the ladder, it [the purlin] turned down on him and threw him out of his balance to the ground."

The plaintiff contends that the purlin which he took hold of to steady himself was on edge, close to the steel column, and that the bolt was left in it; and that for these reasons he was led to believe that it was bolted in place, that it was safe for him to take hold of it, and that it was negligence on the part of the defendants to leave it in that position under the circumstances.

We will first consider the case against the railroad company. There is no evidence that this defendant had anything whatever to do with the erection of the building, other than to supervise the construction for the purpose of seeing that the work was done in conformity with the contract and in accordance with the drawings and specifications; the contract provided that the work should be done under the direction and control and to the satisfaction of the chief engineer of the railroad, whose decision as to the true construction and meaning of the drawings and specifications should be final. The work of straightening the truss was not being done by the railroad company and it had no control or direction as to the manner of its performance; the only connec-

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tion the company had with that work was to see that it, in common with all other construction, was performed in accordance with the terms of the contract.

The reply made by Caswell, the defendant's inspector, in reply to the inquiry made by Houston, the McClintic, Marshall Company's foreman, as to where spikes could be obtained, had no tendency to show that the railroad company was in any way engaged in the work being done when the plaintiff was hurt. It follows that there was no evidence that the defendant railroad failed in any duty which it owed to the plaintiff or that his injuries were due to its negligence.

While the ladder was placed where it was found, by employees of Pike and Sons, the evidence would not warrant a finding that the plaintiff was invited to use it; there were other ways of reaching the roof, and there is nothing to show that the ladder was placed there for the use of the employees of McClintic, Marshall Company. Accordingly the plaintiff did not use it by invitation of Pike and Sons; but in using the ladder as to that company he was merely a licensee. *Blackstone* v. *Chelmsford Foundry Co.* 170 Mass. 321. *Cole* v. *L. D. Willcutt & Sons Co.* 214 Mass. 453.

Nor was the evidence that the purlin was unbolted and stood on edge close to the steel column with the bolt left in it evidence of negligence of Pike and Sons. The building was in process of construction and in an unfinished state; the plaintiff testified, and there was other evidence, that at the time of the accident in different parts of the building some of the purlins were on edge as they would be when bolted in position, while others were lying flat on the struts, some of which he walked over in passing along between the ground and the roof. In view of these obvious conditions, even if the plaintiff knew that previously all the purlins had been bolted to the steel work, still a finding of negligence on the part of Pike and Sons would not have been warranted.

The plaintiff was an experienced structural iron worker, he knew that it was necessary while working in a place high above the ground to be careful; he testified that while acting as foreman for the Boston Elevated Railway Company he had cautioned men working under him in high places to look out and be careful. Under the obvious conditions which surrounded him, in-

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cluding the fact that some of the purlins were lying flat, while others were on edge, the plaintiff was not entitled to assume that the one he took hold of was fastened; the danger of injury from such a cause was one of the risks of the work in which he was engaged, and as to which the defendant Pike and Sons owed him no duty. The risk of injury was not due to a permanently unsafe condition of the building, but was temporary and transitory, which the defendant ought not reasonably to be held to have anticipated and guarded against. *Noonan* v. *Foley*, 217 Mass. 566. *Coyne* v. *Byrne*, 214 Mass. 221. *Gainey* v. *Peabody*, 213 Mass. 229. *Gillette* v. *General Electric Co.* 187 Mass. 1. *Kanz* v. *Page*, 168 Mass. 217. *Whittaker* v. *Bent*, 167 Mass. 588.

We cannot agree with the plaintiff's contention that the condition of the purlin was in the nature of a trap. The case at bar is plainly distinguishable from *Riley* v. *Lissner*, 160 Mass. 330, *Galli* v. *Drapeau*, 216 Mass. 144, but is governed by *Young* v. *Miller*, 167 Mass. 224, *Beique* v. *Hosmer*, 169 Mass. 541, *Boisvert* v. *Ward*, 199 Mass. 594, *Murdock* v. *Paine Furniture Co.* 211 Mass. 97, *Gainey* v. *Peabody*, *supra*.

As we are of opinion that there was no evidence to warrant a finding of negligence on the part of either defendant, we need not consider the conduct of the plaintiff. The exceptions which have not been argued are treated as waived; the others, for the reasons above stated, are overruled. In accordance with the terms of the report, the entry in each case must be

Verdict to stand.

CHARLES C. DUNBAR *vs.* SOL ROSENBLOOM & trustees.

Suffolk. March 19, 22, 1918. — May 23, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Removal of Suits. Jurisdiction. Trustee Process.

Under the Judicial Code, U. S. St. 1911, c. 231, §§ 24, 28, 29, in an action to recover a sum greater than $3,000 brought in the Superior Court by a resident of this Commonwealth against a resident of another State begun by trustee process, in which numerous residents of this Commonwealth are named as trustees and

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where no service of the writ was made upon the defendant, who appeared specially only to file a petition for the removal of the case to the District Court of the United States, the petition for removal must be granted as matter of right on the record and, if any issues of fact are raised, they must be heard and determined in the federal court.

In such a case the residence of the persons summoned as trustees is immaterial upon the question of the right to removal, they being merely stakeholders having no interest in the main controversy.

The Judicial Code cited above provides in § 29 that a petition for removal must be filed by the defendant "at the time, or any time before the defendant is required by the laws of the State or the rule of the State court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff," and Rule 7 of the Superior Court, 1917, requires that answers and like pleadings shall be filed within twenty-one days from the return or entry day of the writ, and upon the petition for removal above described it was *held* that, as the petitioner had not been served with process and had not appeared voluntarily before he filed his petition for removal, the twenty-one days mentioned in the rule of court had not begun to run and the defendant had complied with the requirement of the Judicial Code by filing his petition for removal earlier than the time limited by the rule.

Under Rule 7 of the Superior Court, 1917, which requires that answers and like pleadings shall be filed within twenty-one days from the return or entry day, the twenty-one days do not begin to run until the time for such return or entry has been specified in a precept of the court served in some adequate form upon the defendant ordering him to appear.

Under § 51 of the Judicial Code, which provides that "where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant," a defendant resident in another State may maintain a petition for removal of the case to the District Court of the United States for the District of Massachusetts if the plaintiff is a resident of this district.

CONTRACT on an account annexed for $40,000, the account containing a single item of that amount for "Commissions for sale of merchandise and whiskey certificates," many residents of this Commonwealth being summoned as trustees. Writ dated September 15, 1917.

The defendant, being a citizen and resident of the city of Pittsburgh in the State of Pennsylvania, filed on January 14, 1918, a petition for the removal of the case to the District Court of the United States for the District of Massachusetts, presenting therewith a bond in accordance with the requirements of § 29 of the Judicial Code, U. S. St. 1911, c. 231; 36 U. S. Sts. at Large, 1087, alleging that the defendant had not been served with process and had not appeared in any way in the action except by filing the petition for removal.

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The plaintiff filed a plea in abatement, praying that the defendant's petition for removal might be abated and dismissed.

The case was heard upon the plea in abatement by *Wait*, J., who made an order overruling the plea and accepting the defendant's petition and bond for removal of the action from the Superior Court to the District Court of the United States for the District of Massachusetts. The plaintiff appealed.

E. M. Shanley, for the plaintiff.

Lee M. Friedman, (*L. G. King* with him,) for the defendant.

RUGG, C. J. This action of contract was commenced by trustee writ returnable in the Superior Court on the first Monday of November, 1917. The plaintiff is alleged to be a resident of Boston and the defendant a resident of Pittsburgh in the State of Pennsylvania. Numerous residents of this Commonwealth were named as trustees. No service of the writ was made upon the defendant, and he did not appear in court until January 14, 1918, when he appeared specially to file a petition for the removal of the cause to the District Court of the United States for the District of Massachusetts on the ground of diversity of citizenship of the plaintiff and the defendant. On the same January 14, the petition and bond for removal were accepted by the Superior Court. The plaintiff's appeal brings the case here.

The only question presented is whether as matter of law a case for removal is made out on the face of the record. If any issues of fact are raised, they must be heard and determined in the federal and not in the State court. *Long* v. *Quinn Brothers, Inc.* 215 Mass. 85.

All the elements requisite to make out a case for removal on the face of the record are present. This is a civil action at law involving the requisite jurisdictional amount, between citizens of different States, the defendant not being a resident of this State and being the party petitioning for the removal to the federal court, and the petition for removal is in proper form. Judicial Code, U. S. St. 1911, c. 231, §§ 24, 28, 29. 36 U. S. Sts. at Large, 1087. *Chesapeake & Ohio Railway* v. *Cockrell*, 232 U. S. 146, 151, 152.

Although several residents of this Commonwealth are summoned as trustees of the principal defendant, their residence is

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immaterial upon the question of removal and cannot defeat the right of the defendant in this regard. The persons summoned as trustees have no interest in the main controversy. They are merely stakeholders. *Reynolds* v. *Missouri, Kansas & Texas Railway,* 224 Mass. 253. *Cavanaugh* v. *Merrimac Hat Co.* 213 Mass. 384. The residences of the necessary parties adversary respecting the fundamental basis of litigation being in different States, that is enough to require removal to the federal court on the petition of a non-resident defendant. *Bacon* v. *Rives,* 106 U. S. 99, 104. *Wilson* v. *Oswego Township,* 151 U. S. 56, 64. As to removal, the case stands on the same footing as it would if a valid attachment of property of a non-resident defendant had been made in any other manner than by trustee process. See *Clark* v. *Wells,* 203 U. S. 164.

The petition for removal must be filed by the defendant "at the time or any time before the defendant is required by the laws of the State or the rule of the State court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff." Judicial Code, U. S. St. 1911, c. 231, § 29. Answers and like pleadings must be filed within twenty-one days from the return or entry day of the writ under our practice. Rule 7 of the Superior Court, 1917. It is a necessary implication of this rule that the twenty-one days do not begin to run until the time specified in a precept of the court served in some adequate form upon the defendant ordering him to appear. A defendant cannot be required to plead to an action at law until he has first been summoned to court. *Windsor* v. *McVeigh,* 93 U. S. 274, 279. See *Herbert* v. *Bicknell,* 233 U. S. 70. Special provision is made by our laws for service of a precept upon a non-resident defendant upon whom no personal or other adequate service has been made. R. L. c. 167, § 34; c. 170, § 6. On this record no service had been made on the defendant. Therefore, the time for him to answer under the rule had not come. *Lewis* v. *Northern Railroad,* 139 Mass. 294. It is of no consequence whether he had actual knowledge of the matter or not. He had not appeared voluntarily before filing the petition for removal. Cases like *Olds* v. *City Trust, Safe Deposit & Surety Co.* 180 Mass. 1, *Morrison* v. *Underwood,* 5 Cush. 52, and *Cheshire National Bank* v. *Jaynes,* 224 Mass. 14, relied upon by the plaintiff, have no relevancy in this connection.

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No discussion is required to demonstrate that the defendant might at his option appear at an earlier time than that limited by the rule, in order to file his petition for removal. Courts interpose no barrier to the voluntary appearance of defendants seeking an early adjudication of their rights.

There can be removal from the State to the federal court only of actions "of which the district courts of the United States are given original jurisdiction." Judicial Code, § 28. With exceptions not here material, "no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." Judicial Code, § 51. The plaintiff being a resident of this district, the jurisdiction of the United States District Court for this district may be invoked by petition for removal by a defendant resident in another State. *Duff* v. *Hildreth*, 183 Mass. 440, 441. *In re Moore*, 209 U. S. 490, 500–508. Upon the facts here disclosed, the decision of *Ex parte Wisner*, 203 U. S. 449, has no pertinency.

The case appears to be removable upon the face of the whole record, and the order approving the petition and bond was correct.

Order affirmed.

COMMONWEALTH *vs.* MARK A. SLOCUM.

Hampden. March 25, 1918. — May 23, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Springfield. Constitutional Law, Police power. *Carrier*, Of passengers. *Motor Vehicle. Municipal Corporations*, By-laws and ordinances. *Statute*, Amendment. *License. Tax.*

St. 1913, c. 429, in substance empowering the mayor and aldermen and the city council of Springfield to delegate to commissions, boards or heads of departments such powers as to the granting and issuing of licenses or permits as the mayor and aldermen or the city council are authorized to grant and issue by the statutes of the Commonwealth, is constitutional, and it is a proper exercise of the power so granted for the city council of Springfield by an ordinance approved by the mayor to delegate to the police commission of that city the power vested

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in the city by St. 1916, c. 293, upon its acceptance of that statute by the council, of licensing and regulating the transportation of passengers for hire by motor vehicles.

The authority thus conferred by St. 1913, c. 429, above described, includes authority to delegate powers conferred upon the city council by statutes after its passage as well as those already conferred at the time of its enactment.

If an ordinance of a city contains some provisions which are valid and some which are unconstitutional and void, and those which are invalid are so distinct and severable that, notwithstanding their invalidity, the remainder of the ordinance may stand as valid, and if the ordinance is amended to correct the invalid provisions, it constitutes after amendment a single statutory entity and is to be construed as a whole.

By a provision of an ordinance of the city council of Springfield, which had accepted St. 1916, c. 293, authorizing the police commission of the city to grant licenses for the transportation of passengers for hire by motor vehicles when the commission finds the applicants to be "suitable to conduct such business" and the vehicles, after inspection, to be "proper and safe for use in such business," an untrammelled volition to grant or deny applications is not conferred, and the police commission is under obligation to act reasonably with reference to a business recognized as lawful when pursued with adequate safeguards.

A further provision of the same ordinance, that each licensee shall furnish a bond in the sum of $1,000 for the benefit of persons who may be injured by the carelessness of the licensee or of his employee in operating the motor vehicle, is not unduly burdensome nor unreasonable.

Other provisions of the same ordinance, giving to the treasurer of the city power after a hearing to require further surety or sureties upon the bond to be given by the licensee as above described, were *held* not to be open to sound objection.

A requirement in the same ordinance of the payment of $5 for each such license is not as a matter of law a tax upon property rather than a fee.

It was held that the ordinance above described was not prohibitive of a legitimate business but was merely regulative within the limits of reason, that it was not void as against public policy, and that it was constitutional and valid.

INDICTMENT, returned on September 10, 1917, charging that the defendant operated a motor vehicle on August 29, 1917, in the city of Springfield for the transportation of passengers for hire as a business without being licensed so to do by the city or its police commission.

In the Superior Court the case was tried before *Hamilton*, J. There was a verdict of guilty, and at the defendant's request the judge reported the case for determination by this court, the verdict to stand if the ordinance violated by the defendant was valid; otherwise, a verdict of not guilty was to be entered.

St. 1916, c. 293, is as follows:

"Section 1. Cities and towns shall have authority to license and regulate the transportation of passengers for hire as a business between fixed and regular termini by means of any motor vehicle,

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except the trackless trolley vehicle, so called, not running on tracks or rails, and may impose reasonable license fees, make regulations for the operation of such vehicles within their own limits, and impose suitable penalties for the violation of such regulations: provided, however, that no such motor vehicle shall be operated as aforesaid until the licensee of the vehicle, in addition to complying with all regulations of the city or town in which the vehicle is to be operated, shall have deposited with the treasurer of any city or town in which a license has been taken out, security by bond or otherwise, approved by the city or town treasurer, in such sum as the city or town may reasonably require, conditioned to pay any final judgment obtained against the principal named in the bond for any injury to person or property, or damage for causing the death of any person, by reason of any negligent or unlawful act on the part of the principal named in said bond, his or its agents, employees or drivers, in the use or operation of any such vehicle. Any person so injured or damaged may sue on the bond in the name of the city or town treasurer, and damages so recovered shall go to the person injured or damaged.

"Section 2. Nothing in this act shall be construed as requiring the licensee to file more than one bond, which shall be filed in any city or town in which a license has been taken out.

"Section 3. This act shall take full effect in cities upon its acceptance by the city council, and in towns upon its acceptance by the voters of the town at any duly called town meeting. For the purpose of submitting this act to cities and to towns, it shall take effect upon its passage."

Chapter 7 of the ordinances of Springfield of 1916, which went into effect on November 1, 1916, and, incorporated therein, the amendments made by an ordinance which was passed on August 21, 1917, and became effectual on August 26, 1917, was as follows:

"Section 1. No person, firm or corporation shall engage in the city of Springfield in the transportation of passengers for hire as a business between fixed and regular termini by means of any motor vehicle, except the trackless trolley vehicle, so called, not running on tracks or rails, unless licensed so to do under the provisions hereof and then only as hereinafter provided.

"Section 2. The city council hereby delegates to the police commission the power vested in it by the laws of the Commonwealth

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to license such motor vehicles for such transportation of passengers as a business.

"Section 3. Applications for such licenses shall be made to the police commission on blank forms furnished by said commission and shall set forth the name, place of residence and post-office address of the applicant, a brief description of the motor vehicle a license for which is being applied for and such other information as the said commission may require. The said commission may require that the truth of the allegations in such applications shall be sworn to before an officer authorized to administer oaths.

"Section 4. The police commission may grant and issue to persons, firms and corporations duly making application therefor licenses to operate such motor vehicles for such transportation of passengers as a business within the city of Springfield subject to the provisions of law and the ordinances of the city of Springfield, provided they find the person, firm or corporation applying therefor suitable to conduct such business and provided further that they cause such vehicle to be inspected and after such inspection find the same to be proper and safe for use in such business.

"Section 5. Persons, firms and corporations making application for such license to operate such vehicles shall designate the route or routes over which they shall desire to operate and with the approval of said commission such route or routes shall be granted. Such route or routes may be changed only with the consent and approval of said commission. Termini of such routes shall be fixed and motor vehicles so licensed shall be driven to such termini before turning around, provided, nevertheless, that no such route shall terminate on Main Street between Franklin Street on the north and Park Street on the south.

"Section 6. Every license shall be signed by the police commission and it shall be recorded in the office thereof. It shall name the person licensed, his place of residence and a brief description of the motor vehicle licensed, the number of passengers exclusive of the operator which the vehicle may carry, and shall continue until the first day of May next ensuing, unless sooner rendered void. Such licenses shall be numbered in regular order as granted and shall be expressed to be subject to the provisions of law and of the ordinances of the city of Springfield applicable thereto.

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"Section 7. The fees for such licenses shall be five dollars for every motor vehicle so licensed.

"Section 8. The said commission shall issue to the licensee a metal plate bearing the words 'Licensed motor vehicle No. ——, Springfield, 19—, — passengers,' setting forth the serial number of the license, the date, and the number of passengers exclusive of the operator that the car is licensed to carry. Said plate shall be attached to and kept on the dash or windshield of the motor vehicle in such a position as to be visible to the occupants thereof.

"Section 9. No person shall operate any such motor vehicle so licensed within the city of Springfield unless he shall be twenty years of age or older and unless he shall have first obtained a license so to do from the police commission, which license shall state the name, height and weight, color of hair, color of eyes and race of the licensee, his home address and the name of his employer if he operates such car as an employee. The application for such license shall be on a blank furnished by said commission, and the form of the application and the kinds of information to be furnished therein by the applicant shall be such as from time to time may be prescribed by said commission, and said commission may require that the truth of the allegations in such application shall be sworn to before an officer authorized to administer oaths. The said commission shall not grant such a license to any applicant who has not demonstrated to the satisfaction of said commission his ability to drive the vehicle proposed to be operated by him. Such licenses shall be signed by the police commission, shall be numbered in regular order as granted, shall be recorded in the office thereof and shall expire on the first day of May next succeeding the date thereof. The fee for such license shall be one dollar.

"Section 10. The said commission at the time of issuing such license shall deliver to the licensee a metal badge bearing the words: — 'Licensed Chauffeur No. ——, Springfield,' setting forth the serial number of the license, which badge shall be worn conspicuously upon the front of the hat or cap of the licensee at all times when he is operating any motor vehicle licensed under the provisions of this ordinance; and said commission shall also then deliver to the licensee an identification card, stating thereon the number of the license, the name, age, height, weight, color of the hair,

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color of the eyes and race of the licensee, and the term of the license. No such licensee shall permit any other person to wear such badge, nor shall any person wear the badge of any other licensee, when operating any motor vehicle. Every person so licensed, while operating any motor vehicle licensed under the provisions of this ordinance, shall carry his identification card and the license for such vehicle, and at any time when requested by any police officer shall show such license and such identification card.

"Section 11. No motor vehicle so licensed shall be operated without having a sign thereon in form approved by said commission stating the main street or streets of the route, the termini of the route and the fare to be charged, which sign shall be so placed near the lower part of the windshield or on the dash or hood of the vehicle as to be plainly visible to persons on the street in front of the vehicle. The letters and figures on such sign shall be not less than two and one-half inches in height and shall have a stroke of not less than one-quarter inch in width. No other sign of any kind except the owner's name or symbol shall be placed or carried on any such vehicle.

"Section 12. A person licensed to operate such motor vehicle may with the permission of the police commission substitute another vehicle of the same carrying capacity for the vehicle so licensed. Before granting such permission the police commission shall cause said vehicle to be inspected and shall not give such permission unless they find the said vehicle to be proper and safe for use in such business. In case of such substitution the license shall be amended so as to show the substitution and to give a brief description of the motor vehicle so substituted.

"Section 13. A license shall not be issued until the license fee has been paid to the city treasurer nor until he has received a bond approved by him payable to him as such treasurer in the sum of one thousand dollars signed by the licensee as principal and a corporation as surety, which shall have complied with all the provisions of law as to transacting the business of a guarantee, fidelity and surety company within this Commonwealth, or such other sureties as shall be approved by the city treasurer, who shall be jointly and severally liable, conditioned to pay any final judgment obtained against the principal named in the bond for any injury to person or property, or damage for causing the death of

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any person, by reason of any negligent or unlawful act on the part of the principal named in said bond, his or its agents, employees or drivers, in the use or operation of the vehicle so licensed. In case the surety on any such bond is an individual his execution thereof shall be acknowledged before an officer duly authorized to take acknowledgments.

"Section 14. In case said city treasurer at any time shall determine that any surety on any such bond is not possessed of sufficient property to be able to respond to the obligation of surety on such bond, whether any such damage may have occurred or accrued or not, said city treasurer after giving the principal thereof an opportunity to be heard, may require such principal to furnish another or further surety on such bond, or a new bond, for the remainder of the term of the license of the motor vehicle to which such bond relates, and if within five days after notice of such requirement such principal shall not furnish such new bond or such other or further surety, approved by said city treasurer, the motor vehicle license to which such bond relates, without any further action by the police commission, shall stand suspended until such new bond or such other or further surety, approved by said city treasurer, shall be furnished.

"Section 15. In case any surety on any such bond at any time may desire to terminate his liability on such bond as to any such damages that might occur or accrue in the future, such surety may terminate the same by giving at least five days' previous written notice thereof to the principal named in such bond and to the city treasurer, and upon receipt of such notice such principal shall furnish another surety on such bond or a new bond for the remainder of the term of the license of the motor vehicle to which such bond relates, and if before such termination of such liability of such surety such principal shall not furnish such new bond or such other surety, approved by the city treasurer, the motor vehicle license to which such bond relates, without any action by the police commission, shall stand suspended until such new bond or such other surety, approved by the city treasurer, shall be furnished.

"Section 16. No person operating any motor vehicle so licensed shall refuse to carry any person offering himself to be carried as a passenger therein, unless the seats of the same are fully occupied, or unless such person be intoxicated or disorderly.

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"Section 17. Every motor vehicle so licensed shall be operated for six or more hours in every day during the term of its license that it is used in such transportation of passengers as a business; but no person shall operate any such vehicle for more than twelve hours in any one day.

"Section 18. No person operating any motor vehicle so licensed shall solicit passengers by outcry or make any noise for the purpose of soliciting passengers.

"Section 19. No motor vehicle so licensed shall stand to wait for passenger in any street, square or public place, except on such portions thereof and during such hours as may be designated therefor by said police commission, and said commission may from time to time designate locations in streets, squares, and public places, in which general street travel will not be materially interfered with, where such vehicles may so stand; and said commission, at any time when it finds that any such location materially interferes with public travel, may cancel such locations, and said commission may at any time cancel any such hours for such use and prescribe other hours therefor.

"Section 20. No motor vehicle so licensed shall be stopped to take on or to discharge passengers at any place on any street except at the curb; nor shall any passenger be permitted to enter or leave the vehicle except from the side thereof nearest the curb, but this latter provision shall not apply to a passenger on a front seat where the operator's seat is on the side of the curb.

"Section 21. No motor vehicle so licensed shall be turned around on Main Street between Franklin Street on the north and Park Street on the south.

"Section 23. No greater number of passengers shall be carried at any one time in any such motor vehicle so licensed, than the license of such vehicle shall specify, provided that in addition thereto children under seven years of age may be carried therein in arms or seated on the laps of parents or adult person accompanying them, but no passenger with a child in arms or seated on the lap shall be permitted on any front seat of the vehicle. Nor shall any person be permitted to stand upon any running board or step of any such vehicle or to sit upon any fender, dash, top or door thereof.

"Section 24. No person operating any motor vehicle so licensed

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shall collect fares, make change, or take on or discharge passengers while such vehicle is in motion; nor shall he have a lighted cigarette, cigar or pipe in his possession while any passenger is being carried therein, nor drink any intoxicating beverage of any kind, nor be under the influence thereof, while engaged in operating such vehicle.

"Section 25. Every person operating any motor vehicle so licensed shall stop the same before crossing the tracks of any steam railroad at the grade thereof.

"Section 26. No person operating a motor vehicle so licensed shall place or maintain or permit to be placed or maintained on such vehicle any curtain or other obstruction in such a way as to interfere with a view of the interior of such vehicle except when it may become necessary so to do to protect passengers from the weather.

"Section 27. No passenger except by special contract shall be charged more than five cents for being carried in any motor vehicle so licensed between any two points in the city within the circle with a radius of two and one-half miles from Court Square; nor shall any passenger be charged or required to pay a greater fare than that set forth on the sign required hereby, or charged or required to pay for any piece of hand baggage more than the amount of the fare charged for the transportation of the passenger, but no charge shall be made for hand baggage which shall be held by the passenger without inconvenience to other passengers.

"Section 28. Every person operating any such motor vehicle so licensed shall deliver any article left therein by any passenger to the police commission not later than twenty-four hours after finding the same and shall receive a receipt therefor from said commission, and said commission shall provide for returning the same to the owner upon proper identification and proof of ownership. All such articles delivered to said commission and not claimed within ninety days from such delivery shall be delivered to the licensee of the vehicle in which they were left.

"Section 29. Whenever in the judgment of the police commission public convenience and necessity so require the commission may grant and issue such licenses for such motor vehicles for terms of one or more weeks. The terms of such licenses shall be stated therein. The fees for such licenses shall be at the rate of one dollar

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for each week of the term thereof. All of the provisions of this ordinance shall apply to such licenses except as otherwise provided in this section.

"Section 30. Nothing in this ordinance contained shall be deemed to apply to any motor vehicle used exclusively for sightseeing purposes or for carrying guests to or from any hotel.

"Section 31. Any person violating any of the provisions of this ordinance shall be liable to a fine not exceeding $20 for each such offence, and any violation thereof on any day shall constitute a separate offence. The police commission may suspend or revoke any license granted hereunder for the violation of the provisions of this ordinance, or of any other law or ordinance or for other sufficient cause, provided that the licensee shall be given an opportunity to be heard before any suspension or revocation of his license."

The amending ordinance also contained the following provision:

"Section 13. Every provision of every regulation of chapter 7 of the ordinances of 1916, being 'An Ordinance Relative to the Licensing and Regulating of Certain Motor Vehicles' and approved October 23, 1916, as hereby amended, is intended to be separable so far as possible, and if any special requirement or provision therein, although intended to be reasonable, should be adjudged to be invalid, it is not intended that the same shall affect the validity of any other provision or provisions therein, and it is intended that every general provision referring to or involving other provisions therein shall apply only to all such other provisions as are valid."

The case was submitted on briefs.

C. Gowdy, for the defendant.

J. B. Ely, District Attorney, *& C. H. Beckwith*, for the Commonwealth.

RUGG, C. J. This indictment charges the defendant with having operated a motor vehicle as a business for the transportation of passengers for hire in Springfield without a license, contrary to statute and ordinance. The defendant does not contend that he did not violate the terms of an ordinance of the city of Springfield; but he urges that the ordinance does not conform to the enabling statute and is unconstitutional on several grounds.

General power is conferred by St. 1916, c. 293, upon such cities

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and towns as accept its provisions to license and regulate transportation of passengers for hire by motor vehicles, subject to the requirement of a bond from the licensee for the benefit of those injured through his negligence or that of his employees in the use of the motor vehicle. That statute has been accepted by the city council of Springfield. The authority conferred by it naturally would be exercised by the city council of Springfield. But it is provided by St. 1913, c. 429, that "The mayor and aldermen, and the city council of the city of Springfield, may delegate to commissions or commissioners, boards or heads of departments, the power respectively vested in them by the laws of the Commonwealth to grant and issue licenses and permits, and may respectively regulate the granting and issuing of licenses or permits which the mayor and aldermen or which the city council are authorized to grant and issue by the statutes of the Commonwealth. . . ."

The Legislature may delegate to general or local boards the right to enact ordinances and to require permits from an administrative officer or officers as a prerequisite to the exercise of different kinds of business affecting the public safety. *Commonwealth* v. *Maletsky*, 203 Mass. 241, 247. In this respect the statute is valid under the authority of many decisions. *Brodbine* v. *Revere*, 182 Mass. 598. *Commonwealth* v. *Sisson*, 189 Mass. 247. *Welch* v. *Swasey*, 193 Mass. 364, 375. *Lyman* v. *Commissioners on Fisheries & Game*, 211 Mass. 10. *Commonwealth* v. *Fox*, 218 Mass. 498, 500. *Commonwealth* v. *Feeney*, 221 Mass. 323. *Commonwealth* v. *Kingsbury*, 199 Mass. 542, 546. *Opinion of the Justices*, 208 Mass. 625, 630. *Commonwealth* v. *Hyde*, *ante*, 6, 8. It is not open to the objections held fatal in *Day* v. *Green*, 4 Cush. 433, *Coffin* v. *Nantucket*, 5 Cush. 269, *Newton* v. *Belger*, 143 Mass. 598, and *Commonwealth* v. *Staples*, 191 Mass. 384, where delegation of such power without legislative sanction was held illegal.

Regulation of the operation of vehicles used for the conveyance of passengers was an early and is a well recognized subject for local by-law or ordinance. *Commonwealth* v. *Stodder*, 2 Cush. 562. *Commonwealth* v. *Matthews*, 122 Mass. 60. *Commonwealth* v. *Page*, 155 Mass. 227. The police power extends to the reasonable control of travel upon highways in the interest of the public. *Commonwealth* v. *Morrison*, 197 Mass. 199. That this power includes automobiles is not open to question. *Commonwealth* v.

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Boyd, 188 Mass. 79. *Dudley* v. *Northampton Street Railway*, 202 Mass. 443, 446. *Hendrick* v. *Maryland*, 235 U. S. 610, 622.

The authority vested by St. 1913, c. 429, in the city council of Springfield to delegate its authority to issue permits and licenses to executive or administrative boards or officers includes powers conferred in the future as well as those already conferred. A general law which contains no restrictive phrases operates upon all matters within its scope arising after its enactment. *Hanscom* v. *Malden & Melrose Gas Light Co.* 220 Mass. 1, 3. This statute does not, either by grammatical construction or rational interpretation, narrow the authority to delegate to subjects already vested to the exclusion of subjects hereafter to be vested in the city council. The power to grant, when not made imperative, implies the discretion to refuse. The right to delegate the one includes the other.

An ordinance passed in 1916 by the city council, under the authority assumed to be conferred by the statute, was amended in some particulars in 1917. It is contended that the original enactment was void because in several particulars in contravention of rights secured by the Constitution, and that hence it cannot be rendered valid by amendment. See *Schwartz* v. *Oshkosh*, 55 Wis. 490, and *Cowley* v. *Rushville*, 60 Ind. 327. Without pausing to consider the soundness, scope and limitations of that principle, it is not applicable to the case at bar. There were numerous provisions of the original ordinance, unchanged by any amendment, which are not and could not with any show of reason be assailed as unconstitutional. Even if it be assumed, but without so deciding, that one or more sections of the original ordinance may have been void, it is plain, without extended analysis of its provisions, that such sections were so distinct and severable in their nature from other sections that the remainder of the ordinance might have stood as valid. *Ashley* v. *Three Justices of the Superior Court*, 228 Mass. 63, 81. The ordinance of 1916, as amended in 1917, constitutes a single statutory entity and is to be construed as a whole. *Merrill* v. *Paige*, 229 Mass. 511, 513.

The ordinance regulates in considerable detail the method of applying for licenses and the information to be set forth in the application. It prescribes the fee to be paid, the amount of the bond required, the qualification of the sureties, the persons entitled

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to the benefit of the bond, the signs to be displayed on the licensed motor vehicle, specifications as to operation with reference to other travel on the streets, places where stops may be made, approval of routes, rate of fare to be charged and number of passengers to be carried, with prohibitions as to certain means of solicitation of passengers and other subsidiary provisions. This summary of its terms demonstrates that the ordinance is legislative in its nature. It lays down general rules for the guidance of the licensing board and officer, and of the licensees.

When its provisions are examined more critically, they disclose no omissions or requirements invalid in their nature.

The police commission is authorized to grant licenses when the applicants are found to be "suitable to conduct such business" and the vehicles, after inspection, are found to be "proper and safe for use in such business." An untrammelled volition to grant or deny applications is not thus conferred, but rather an obligation is imposed to act reasonably with reference to a business recognized as lawful when pursued with adequate safeguards. The reasoning of such decisions as *Commonwealth* v. *Maletsky*, 203 Mass. 241, 246, *Goldstein* v. *Conner*, 212 Mass. 57, and *Kilgour* v. *Gratto*, 224 Mass. 78, where ordinances vesting an unrestrained discretion in a subordinate board or officer were held void, has no applicability to the ordinance here attacked.

The requirements of the ordinance are not unreasonable. It cannot rightly be said to be unduly burdensome to exact from each licensee a bond in the penal sum of $1,000 for the benefit of those who may be injured by the carelessness of the licensee or his employees in operating the vehicle. It is matter of common knowledge that damages far in excess of that amount not infrequently are awarded for personal injuries sustained by those who are riding in or injured by contact with automobiles. The power vested in the city treasurer to require further surety or sureties upon the bond, after determining that the existing surety or sureties are insufficient, is not open to sound objection. The principles by which he must be guided are laid down with sufficient definiteness in the ordinance and he can act only after a hearing. His conduct cannot under the ordinance be capricious, but must depend upon a finding of the existence of specified facts.

The requirement of a payment of $5 for each license issued can-

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not be pronounced as matter of law a tax on property rather than a fee. Its amount is not excessive in view of the normal expenses incidental to the system of registration and inspection established by the ordinance.

There is no ground for the contention that the ordinance as thus construed is void as against public policy. Its terms are not prohibitive of a legitimate business, but are merely regulative within the limits of reason.

It is not necessary to discuss the ordinance in further detail. All the objections presented in the brief for the defendant have been considered, and no reason is found for disturbing the verdict, which is to stand.

So ordered.

FRED N. GARDNER *vs.* HENRY M. FARNUM.
ROBERT K. GARDNER *vs.* SAME.

Essex. March 25, 1918. — May 23, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Agency, Scope of employment. *Motor Vehicle*. *Evidence*, Of agency, Absence of witness, Inference. *Witness*.

Evidence at the trial of an action for personal injuries resulting from an accident caused by negligence of the driver of a motor vehicle, which tends merely to show that the defendant, who was not in the vehicle at the time of the accident, owned the vehicle and that the driver was in his general employ, is not sufficient to warrant a finding that at the time of the accident the driver was acting within the scope of his employment.

At the trial of the action above described, there was further evidence tending to show that the defendant lived in Chicago in the State of Illinois and owned and occupied during the summer a residence at Magnolia, a part of Gloucester, that at the time of the accident the defendant and his family had left for Chicago, that on the morning of the accident the chauffeur had driven the motor vehicle to Gloucester from Magnolia, there drank intoxicating liquor, "went on an errand," came back with an elaborate and expensive toy sail boat which he put in the back of the vehicle and returned to Magnolia, the accident happening on the return trip; that the defendant had two daughters, one eight and the other two years of age, and that the chauffeur had no children. *Held*, that the evidence did not warrant an inference that in purchasing the toy boat the chauffeur was upon an errand for the defendant nor that he was acting within the scope of his employment at the time of the accident.

The trial of the action above described was in Salem and occupied two days. The defendant offered no testimony. The plaintiff did not call the defendant's

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chauffeur to testify on the first day nor had he then served a summons upon him. On the second day the plaintiff offered testimony tending to show that the chauffeur had come to Salem on the first day of the trial, had been met by an associate counsel for the defence, had gone with him to an office and had not been seen since; that once in the afternoon and again in the evening of the first day of the trial an associate counsel for the plaintiff and a sheriff with a summons had made search for the chauffeur at his place of residence in Magnolia and had found the house closed and dark, and that they also had searched for him in Salem unsuccessfully. *Held*, that the evidence would not warrant a finding that the failure of the plaintiff to find the chauffeur to summon him was due to any act on the part of the defendant.

TWO ACTIONS OF TORT, the first action being by a minor (hereinafter called the plaintiff) for personal injuries received when he was knocked down and run over by an automobile owned by the defendant and operated by a chauffeur (Anderson by name) in his general employ, and the second action being by the father of the plaintiff in the first action for consequential damages. Writs dated July 15, 1915.

In the Superior Court the cases were tried together before *Hitchcock*, J. The due care of the plaintiff and the negligence of the chauffeur were admitted.

The trial occupied two days. The evidence relating to the failure of the plaintiff to find the chauffeur or his wife, referred to in the opinion, was as follows:

On the second day of the trial H. R. Hodsdon, Esquire, associated as counsel for the plaintiff, testified that on the afternoon of the previous day he and the sheriff drove in a motor car to a cottage in Magnolia where the chauffeur and his wife lived in the summer and where the witness the week before had seen him and the wife and where the defendant's machine was kept; that the sheriff knocked at the back and the front doors, got no response, found no one and was unable to serve a subpœna on either the chauffeur or his wife; that the sheriff and the witness then came back to Salem and the same day in the evening again went over the road to the Anderson cottage; that the place was dark, locked up and that no one could be found; that they then went to the defendant's house and the sheriff subpœnaed another witness; that after that they drove back to Salem, where a further search was made for Anderson; that he did not see the defendant or his wife or the touring car at Magnolia. One Minnie Fraser, who had testified on the first day of the trial, recalled on the second day, testified

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that when she came to court the day before, she came from the house in a bus with the chauffeur and his wife and that they went in the bus with her and took the train from Magnolia and came to Salem; that they got off at Salem, the three of them together, and went with Mr. Merrill, a lawyer associated with counsel for the defence, that they shook hands with Mr. Merrill in the station and went with him to an office near the court house, and that she did not see Anderson after that.

Other material evidence is described in the opinion.

At the close of the plaintiff's evidence, the defendant rested and moved in each case that a verdict be ordered for him. The motions were denied. The jury found for the plaintiff in the first action in the sum of $2,000, and in the second action in the sum of $200; and the defendant alleged exceptions.

E. C. Stone, for the defendant.

V. C. Lawrence, (*H. R. Hodsdon* with him,) for the plaintiffs.

CROSBY, J. These are two actions of tort — one to recover for personal injuries received by the minor plaintiff, the other to recover for services and expenses incurred by the adult plaintiff — arising out of an automobile accident.

The automobile in question was owned by the defendant and was operated by one Anderson, a chauffeur in the general employ of the defendant. It was admitted that the minor plaintiff was in the exercise of due care and that Anderson was negligent; the only question before us is whether there was any evidence to show that Anderson was acting within the scope of his employment, at the time of the accident.

The defendant, a summer resident of Magnolia in the city of Gloucester, had left there with his family before the accident occurred. At the trial in the Superior Court he offered no evidence; and the case was submitted to the jury upon the testimony presented by the plaintiffs, at the close of which the presiding judge refused to order verdicts for the defendant.

The undisputed evidence showed that Anderson and his wife lived at the Mallard House in Magnolia, after his employer's family left at the end of the summer, and that the automobile was taken away at the end of each season; that on the morning of the accident Anderson drove the car to Gloucester and while there drank liquor at different places; that he then "went to do

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an errand" and returned with a toy sail boat which he put in the back of the machine; that he was under the influence of liquor, and while returning to Magnolia the accident occurred; that later on the same day he took his wife and some other persons to Boston in the automobile.

It appeared that the defendant had two daughters — eight and two years old respectively — that Anderson had no children; and that the toy boat was an elaborate and expensive one. The plaintiff contends that the evidence was sufficient to warrant a finding that in going to Gloucester and purchasing the boat, Anderson was engaged in the performance of an errand for his employer, — that he had been sent there to purchase the boat for the defendant's daughters, and he was returning from the performance of that errand when the accident occurred.

The fact that the defendant owned the automobile is not enough to show that Anderson was acting within the scope of his employment at the time of the accident. *Hartnett* v. *Gryzmish*, 218 Mass. 258, 262. Nor was the evidence that the defendant owned the automobile and that the chauffeur was in his general employ sufficient to show that he (the chauffeur) was engaged in his master's business. *Hartnett* v. *Gryzmish, supra. Poirier* v. *Terceiro*, 224 Mass. 435.

The evidence fails to disclose that the use of the car by Anderson was an incident of his employment, as was held in *Reynolds* v. *Denholm*, 213 Mass. 576. *Campbell* v. *Arnold*, 219 Mass. 160. There is an entire absence of testimony indicating that Anderson purchased the toy boat for any child of the defendant, or if such was his purpose, that the defendant or any member of his family directed it or knew that such purchase was to be made; nor can it reasonably be inferred, upon any view of the evidence, that he was engaged at the time of the accident on any business or errand for his employer, — to decide otherwise would be to reach a conclusion based wholly upon speculation and conjecture. *Perlstein* v. *American Express Co.* 177 Mass. 530. *McCarthy* v. *Timmins*, 178 Mass. 378. *Trombley* v. *Stevens-Duryea Co.* 206 Mass. 516. *Hartnett* v. *Gryzmish, supra. Marsal* v. *Hickey*, 225 Mass. 170. The case of *Heywood* v. *Ogasapian*, 224 Mass. 203, and others cited and relied on by the plaintiff, are plainly distinguishable from the case at bar. See *D'Addio* v. *Hinckley*

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Rendering Co. 213 Mass. 465; *McKeever* v. *Ratcliffe*, 218 Mass. 17; *Donahue* v. *Vorenberg*, 227 Mass. 1.

The plaintiff also contends that the jury would have been justified in finding that at the time of the accident the chauffeur was on his way to Boston to ship the automobile to Chicago, in accordance with the defendant's instructions. The difficulty with that contention is that there is no evidence to support it; besides, in going from Magnolia to Gloucester, Anderson travelled in the opposite direction from Boston. If he went to Gloucester to obtain liquor he could not be found to be engaged in his master's business. *McCarthy* v. *Timmins*, *supra*.

There is nothing to indicate that the failure of the plaintiff to find Anderson or his wife on the first day of the trial that they might be subpoenaed as witnesses, was due to any act on the part of the defendant.

As verdicts for the plaintiffs were not warranted, in view of the evidence most favorable to them, it follows that the defendant's requests to direct verdicts in his favor should have been given.

Exceptions sustained.

MARY E. SHEA *vs.* HENRY C. PETERS, AGNES M. PETERS, intervening petitioner.

Suffolk. March 27, 1918. — May 23, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Attachment, Dissolution, Special. *Statute*, Construction. *Constitutional Law*, Trial by jury. *Jury*.

Both R. L. c. 167, § 110, providing a defendant, whose property has been attached on mesne process, with a remedy, upon a petition, by reduction or dissolution of an excessive or unreasonable attachment, and St. 1909, c. 190, amending that statute by extending its benefits to a "person whose property has been attached," are remedial in their nature and designed to afford relief against conduct in its nature resembling abuse of the process of attachment; and their words should be construed in accordance with their manifest purpose in order to afford adequate redress for the evil against which they appear to be aimed.

An attachment, upon a writ of original summons and attachment in an action at law, described by the attaching officer in his return as an attachment "specially" of "all the right, title and interest the" defendant had "in and to" certain real estate, which he described by metes and bounds, "the record title to which stands in the name of" a person other than the defendant, is an attachment made "on mesne process" within the provisions of the statutes above described.

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A wife, whose real estate, purchased by her with her own money, owned by her and standing of record in her own name, has been specially attached on mesne process in an action at law against her husband only, is "a person whose property has been attached" and as such is entitled to relief by dissolution of the attachment under the statutes above described.

The right to acquire a lien by special attachment under R. L. c. 167, §§ 38, 63, is a creature of statute, a right in its nature preliminary or subsidiary to the main question of liability involved in the action, and is not a natural right.

R. L. c. 167, § 110, amended by St. 1909, c. 190, does not violate the right to trial by jury secured by the Constitution.

CONTRACT OR TORT. Writ dated April 17, 1917.

The officer's return stated that he had "attached specially all the right, title and interest the" defendant had "in and to the following described piece or parcel of real estate the record title to which stands in the name of Agnes M. Peters," and described the parcel by metes and bounds.

On December 6, 1917, Agnes M. Peters filed a petition, which as afterwards amended, alleged that she was the wife of the defendant, that the plaintiff had made an unreasonable attachment of her property, asserting that property standing in her name was in reality the property of her husband, that such property had been purchased with her own money and was owned by her and that the defendant had no attachable interest therein. The prayer was that the special attachment should be discharged and for such other relief as should seem proper.

The petition was heard by *Wait*, J., who ruled that the petitioner's remedy was "after judgment under the statute providing for special attachments," dismissed the petition as a matter of law and reported the case for determination by this court.

E. H. Savary, for the intervening petitioner Agnes M. Peters.

No counsel appeared for the plaintiff.

RUGG, C. J. The plaintiff in this action against Henry C. Peters made special attachments of real estate, claiming that it belongs to him but stands fraudulently in the name of Agnes M. Peters. R. L. c. 167, §§ 38, 63, c. 178, § 1. Agnes M. Peters filed a petition alleging the attachments to be unreasonable, setting forth that she is the absolute owner of said real estate as the purchaser, having paid therefor with her own money, and that the defendant has no attachable interest therein, and praying that the attachments be discharged and for other relief. The judge of the Superior Court ruled that the exclusive relief of the intervening petitioner

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is after judgment under the statute providing for special attachments, ordered the petition dismissed, and reported the matter.

The questions here presented expressly were left undecided in *Sederquist* v. *Brown*, 225 Mass. 217, 220. The decision depends upon the interpretation of R. L. c. 167, § 110, as amended by St. 1909, c. 190, under which this petition is framed. The plain terms of the pertinent section of the Revised Laws confined the right to petition for the reduction or discharge of excessive or unreasonable attachments to defendants. But the amending act expressly put any "person whose property has been attached" on the same footing with the defendant in this particular. As amended, the statutory words here relevant are, "If an excessive or unreasonable attachment is made on mesne process, the defendant or person whose property has been attached, may apply in writing . . . to a justice of the court to which such process is returnable, for a reduction of the amount of the attachment or for its discharge. . . . If, upon a summary hearing of the parties, it is found that the attachment is excessive or unreasonable, the justice shall reduce or dissolve the attachment or order a part of the goods or estate to be released."

Both the original and the amendatory statutes are remedial in their nature, designed to afford relief against conduct in its results resembling abuse of the process of attachment. The words should be construed in accordance with their manifest purpose in order to afford adequate redress for the evil against which the statute appears to be aimed.

It is not open to discussion that a special attachment of the kind here disclosed is an attachment made "on mesne process." *Place* v. *Washburn*, 163 Mass. 530.

The allegations of the petition bring the petitioner within the words of the statute. She is a "person whose property has been attached." It is none the less an attachment of her property because made on a writ running against some one else on the theory that it really is the property of a third person standing in her name. Such an attachment is a matter of record. It constitutes a lien upon her land. *Snyder* v. *Smith*, 185 Mass. 58, 61. As matter of common knowledge such an attachment is a serious interference with the freedom of action of an owner respecting sale or mortgage of the property.

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The reason for the reduction or discharge of excessive or unreasonable attachments applies with quite as much force to third persons as to defendants. A defendant can push his case to a trial and thus relieve himself of uncertainty about his liability. The third person whose property is attached by special process is not a party to the initial controversy. He has no interest in that matter. He cannot become a party to it directly. His contentions in a case like the present cannot in any other way be brought to the attention of the court until after the original action has terminated in a judgment in favor of the plaintiff and a writ of entry has been commenced by the judgment creditor under R. L. c. 178, § 47. He must stand helpless until the immediate parties to the action have settled their disputes. Equity affords no relief in the ordinary case. *Freeman* v. *Carpenter*, 147 Mass. 23. *Dunbar* v. *Kelly*, 189 Mass. 390, 393. It is conceivable that in the meantime great practical injury may be done. The hardship to a third person whose property thus might be attached specially is manifest. It would be natural to assume that legislation dealing with attachments would touch that branch of the subject. The phraseology of the statute as amended, given its ordinary meaning, includes the real and record owner of property which has been attached as belonging to some other person named as defendant in an action or suit. A somewhat strained construction would be required to exclude such owners from the benefits of the statute.

This is not a case where the field of law relating to special attachments appears to be so completely covered by other statutory provisions as to preclude the thought that the present statute relates to that matter as an additional element of relief. See *Crocker* v. *Justices of the Superior Court*, 208 Mass. 162, 178. The present statute appears to have as much relation to special as to other kinds of attachment. Giving the statute its natural meaning and effect in the light of the previous state of the law and the mischief intended to be remedied, it is applicable to a case like the present and permits the person whose property has been attached by special precept to invoke its aid.

The statute as thus interpreted does not violate the right to trial by jury secured by the constitution. Declaration of Rights, art. 15. The acquirement of a lien by special attachment is the creature of statute. It is not a natural right. It is preliminary

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or subsidiary to the main question, which is the establishment of the debt or damage alleged to be due from the principal defendant. This proceeding as to the attachment of property does not affect that main question. It is both in form and in substance merely a qualified custodianship by the law, for the security of a creditor, over property in which the debtor is alleged to have an interest. A summary hearing for the purpose of preventing or averting the effects of oppressive or unreasonable conduct in this particular does not offend against any constitutional right. As was said respecting a somewhat similar contention in *O'Neil* v. *Glover*, 5 Gray, 144, at page 161, "The objection would apply with equal force to a writ of replevin, or to a taking on mesne process or by foreign attachment." *Stockbridge* v. *Mixer*, 215 Mass. 415, 418.

It follows that the ruling was wrong and the case is to stand for hearing upon the petition of Agnes M. Peters.

So ordered.

FRANK MEDLIN *vs.* DAVID N. BLOOM.

Suffolk. March 27, 1918. — May 23, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Negligence, Of physician. *Physician*. *Practice, Civil*, Conduct of trial: requests, rulings and instructions. *Evidence*, Relevancy and materiality.

Where, at the trial of an action of tort against a physician for injuries alleged to have resulted from negligence of the defendant in treating the plaintiff's eyes shortly after his birth, there is conflicting evidence, both on the question, whether the physician gave proper treatment within a few hours after the birth, and on the question whether he gave proper treatment when the symptoms of disease became apparent six days later, it is improper for the trial judge to rule that the jury should find for the defendant if they found that he was not negligent in the treatment he gave within the few hours after the birth.

Where, at the trial of the action above described, there was evidence that the baby's eyes began to show symptoms of disease on a Saturday six days after his birth, that the symptoms grew worse "and on Monday . . . the defendant was summoned, and after being solicited to come on several occasions, appeared at the house of the plaintiff's father" on the afternoon of Tuesday between five and six o'clock, it is proper for the trial judge to rule that "The fact that the defendant did not answer a call for treatment for the plaintiff promptly does not constitute negligence."

It was not evidence of negligence on the part of the defendant in the action above

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described that he did not order nor advise the removal of the plaintiff to a hospital immediately upon discovering his affliction.

At the trial of the action above described evidence was not admissible as to the circumstances and environments in the plaintiff's home, nor as to whether treatment in a hospital then would have been proper or more efficient and desirable.

Evidence tending to show that the defendant in the action above described knew on a Tuesday afternoon, the eighth day after the plaintiff's birth, between five and six o'clock that the plaintiff's eyes had become inflamed, swollen and red and showed an unnatural discharge, and that a notice mailed by the defendant to the health department of the city where the plaintiff lived was postmarked on Thursday morning thirty minutes after midnight, is evidence of a violation by the defendant of R. L. c. 75, § 50, as amended by St. 1905, c. 251, § 2, requiring a notice from the physician under such circumstances "immediately," and is evidence of negligence, the evident purpose of the statutory requirement being to make it possible for immediate and scientific treatment to be given and blindness to be prevented.

TORT by a child for injury resulting in blindness alleged to have been caused by negligence of the defendant, a physician, in the rendering of professional services shortly after the plaintiff's birth, which occurred on April 14, 1916. Writ dated December 5, 1916.

In the Superior Court the action was tried before *Lawton*, J.

The evidence stated in the bill of exceptions as to failure of the defendant to attend the plaintiff promptly was as follows:

"The father and mother of the plaintiff and a Mrs. Hagan testified that the eyes of the baby were all right until Saturday, April 22, 1916, when the right eye became swollen, red and had some little unnatural discharge and the left eye was not as badly affected. The situation of things grew worse and on Monday, April 24, 1916, the defendant was summoned, and after being solicited to come on several occasions, appeared at the house of the plaintiff's father, Tuesday, April 25, 1916, between five and six o'clock in the afternoon."

Other material evidence is described in the opinion.

At the close of the evidence the plaintiff asked for and the trial judge, subject to the plaintiff's exception, refused to give the ruling quoted in the opinion. The defendant asked for and the trial judge gave, subject to exceptions by the plaintiff, the following rulings:

"1. If the infection in the plaintiff's eyes came from an outside source in no way related to treatment administered by the defendant, or connected therewith, the jury should return a verdict for the defendant.

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"2. The fact that the defendant did not answer a call for treatment for the plaintiff promptly does not constitute negligence.

"3. If the jury finds that upon the evidence the defendant did not have charge of the birth of the child, the defendant owed no duty to the plaintiff to put drops of nitrate of silver in the plaintiff's eyes and the jury should return a verdict for the defendant.

"4. That the defendant did not order the plaintiff taken to the hospital is not in itself evidence of negligence sufficient to justify a verdict for the plaintiff."

Portions of the judge's charge to which the plaintiff excepted were as follows:

"For one thing, you do not have to consider and ought not to consider whether he made a report to the board of health as promptly as he ought to have done, or as the statutes expect that he should make a report. As I understand it, there is no question but what he did make the report that the board of health required, but some question has been raised whether he ought not to have done it twenty-four, forty-eight, or seventy-two hours earlier. But I instruct you that anything of that sort, any neglect of that sort could not have had any bearing on the progress of the child's disease, and if you say that he was negligent in that respect; if you say the board of health would have good ground to complain that he did not report it more promptly, it has n't anything to do with this case, and it is of no consequence. . . .

"There has been some suggestion, apparently, that it was negligence — that it was neglect of the skill that an ordinary physician should have, failure of the skill that an ordinary physician ought to exercise — that he did not immediately send the child to a hospital, or perhaps advise that the child should be sent to a hospital, . . . that he did not immediately advise that the child should be sent to the hospital. I instruct you that that is not evidence of negligence, if you find, and it is admitted, that he did not. I instruct you that the fact he did not immediately send the child to the hospital, or immediately advise that the child be sent to a hospital, is no evidence of negligence."

There was a verdict for the defendant; and the plaintiff alleged exceptions.

E. H. Savary, for the plaintiff.

T. I. Hogan, for the defendant.

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CROSBY, J. This is an action of tort for the alleged negligence of the defendant, a physician, in the care of the plaintiff, an infant, by reason of which he became blind.

The defendant signed a birth certificate which stated that he personally attended the birth of the plaintiff, although he admitted he did not deliver the child, but attended him between five and six hours after he was born. He testified that when he first was called he put a solution of nitrate of silver in the plaintiff's eyes; this was denied by the plaintiff who offered evidence to the contrary. That such treatment was proper "and is a part of the technique of child birth," was admitted by the defendant; and there was also evidence that the administering of the solution of nitrate of silver at birth "would make the likelihood of the development of the disease of ophthalmia, which caused the blindness, very much less." The defendant offered evidence that, even if no solution of nitrate of silver was administered at birth, it was shown that the disease was due to a secondary infection, as the symptoms did not develop until eight days afterwards, and that the failure to give the treatment made no difference. The questions, whether the defendant failed to administer the treatment or not, and, if it was not administered, whether the plaintiff's blindness was due to such omission as a proximate cause, were rightly submitted to the jury.

There was nothing to show that the plaintiff's eyes were affected with ophthalmia until April 22, 1916, when the right eye became swollen and red and had an unnatural discharge, — the left eye was not as badly affected. There was evidence that the defendant was called on April 24, 1916, and, after being solicited to come on several occasions, appeared at the house of the plaintiff's father on April 25, 1916, between five and six o'clock in the afternoon; that at that time the plaintiff's eyes were swollen, red and closed, with pus coming from each eye when opened, and that the defendant administered treatment; that the next afternoon between five and six o'clock the defendant came again and took a smear from the plaintiff's eyes, which were in a worse condition than on the day before. The records of the health department of the city of Boston showed that written notice of the case, bearing a postmark "12:30 A. M. April 27, 1916," was received.

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The case is before us upon the plaintiff's exceptions to the exclusion of testimony, the giving of rulings requested by the defendant, the refusal of the trial judge to give a ruling requested by the plaintiff, and to certain parts of the judge's charge.

The defendant's first and third requests, which related to the treatment of the plaintiff by the defendant on his first visit, could not have been given, because, if on that occasion he administered a solution of nitrate of silver and then gave to the plaintiff proper treatment, still there was evidence of negligence of the defendant afterwards. Accordingly these exceptions must be sustained.

The second exception is overruled. The failure of the defendant to attend the plaintiff promptly could not have been found to be negligence under the circumstances.

The fourth exception cannot be sustained. While it may be that the plaintiff would have received better medical treatment if he had been removed to a hospital, yet the defendant's failure to order such removal did not upon this record of itself constitute evidence of negligence sufficient to justify a verdict for the plaintiff. While a physician may advise the removal of a patient to a hospital in an ordinary case, he has no authority to order such removal.

The testimony relating to the plaintiff's home, and whether treatment there would have been proper or would have been more efficient and desirable in a hospital, was excluded properly.

The presiding judge instructed the jury in substance that the failure of the defendant to report the case to the board of health as promptly as he should have done under R. L. c. 75, § 50, as amended by St. 1905, c. 251, § 2, was immaterial, and was not to be considered as evidence of negligence. We are of opinion that this was error, and that the plaintiff was entitled to the ruling asked for by him — "If you find that the defendant violated the provisions of St. 1905, c. 251, that is evidence of negligence on the part of the defendant." *Finnegan* v. *Winslow Skate Manuf. Co.* 189 Mass. 580, 582. *Doherty* v. *Ayer*, 197 Mass. 241. *McCarthy* v. *Morse*, 197 Mass. 332, 336, 337. It could have been found that the defendant on the afternoon of April 25, 1916, knew that the plaintiff's eyes had become inflamed, swollen and red, and showed an unnatural discharge within two weeks after

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birth. In these circumstances, it was the defendant's duty, under the statute, immediately to give notice thereof in writing over his own signature to the board of health. A penalty is prescribed for violation of the statute. The evidence shows that the notice mailed by him was postmarked "12:30 A. M .April 27." The evident purpose of this statute is that the board of health may be informed without delay of the existence of a most serious disease with which very young children may be affected, so that immediate and scientific treatment may be received and blindness prevented. St. 1905, c. 251, § 1. Upon this record it could not properly have been ruled as matter of law that the delay of the defendant in notifying the board of health of the plaintiff's condition was not evidence of negligence. It was for the jury to determine whether the defendant immediately gave the notice required by the statute. If he failed in this respect, such failure was evidence of negligence, which could have been found to have resulted as a proximate cause of the plaintiff's blindness. The exception to the instructions given upon this branch of the case, and the failure to give the ruling asked for by the plaintiff, must be sustained.

The other exceptions need not be considered, as the same questions may not arise at another trial.

Exceptions sustained.

NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY *vs.* YORK AND WHITNEY COMPANY.

Suffolk. December 4, 5, 1917. — May 24, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Practice, Civil, Agreed statement of facts. *Carrier,* Of freight. *Interstate Commerce. Bill of Lading.*

An action of contract by a railroad corporation for certain freight and other charges was tried before a jury on an "agreed statement of facts," which contained statements that certain persons would testify as there narrated, and the defendant "introduced in evidence the original freight bills" of which copies were annexed to the agreed statement of facts and "There was no further evidence offered on either side." The jury returned answers to special questions submitted to them by the presiding judge. *Held,* that the

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record showed that the case was tried upon the statement of agreed facts submitted as evidence, which with other evidence was the basis from which the ultimate decisive facts so far as necessary must be determined.

In the case described above it also was *held* that, where more than one rational inference could be drawn from the evidence as stated, a question of fact for the jury was presented, and the only question of law in regard to such an inference was whether the jury's finding of fact was warranted.

The provisions of the interstate commerce law as to rates are applicable only to those who expressly or by implication are or become parties to the contract of transportation. Whether one is or has become a party to that contract must be determined by the general principles of the common law. By RUGG, C. J.

Where perishable produce is shipped under a "straight" bill of lading in the form established by the interstate commerce commission but the bill of lading is retained by the shipper, and the consignee, who is not a party to the bill of lading and does not know its terms, notifies the carrier upon the arrival of the goods that he is not their owner but is merely an agent to sell the goods on commission and asks the carrier for the amount of the charges in order to decide whether he will receive or decline to accept the consignment, if the carrier names an amount less than the rates established by the tariffs filed and published in compliance with the interstate commerce act, and the consignee thereupon in good faith pays the amount named and receives the goods, he is not bound by the terms of the contract to which he was not a party and of which he had no notice.

In the case in which the point above stated was decided, it was *said* that it was not necessary to consider what would have been the rights and obligations of the parties if the bill of lading had contained the express stipulation that the consignee alone should pay the freight as a condition precedent to delivery to him.

Where, however, the consignee of such perishable produce, not its owner but merely an agent to sell it on commission and not a party to the bill of lading, before the shipment was made wrote to the freight traffic manager of the carrier asking for the rates on such perishable produce, and received a reply from the freight agent giving the correct rates with specific references to the published tariffs, which would have enabled him by a simple computation to know the amount of the lawful charges, and thereafter the consignee accepted and received certain carloads of the perishable produce, paying lower charges named to him by the local freight agent of the carrier on the arrival of the goods, it was *held*, that a finding was warranted that the consignee knew and expected to pay the legal tariff rates and accepted the goods understanding that the carrier required the payment of the legal charges, and accordingly that upon those shipments he was liable to pay to the carrier the balance above the undercharges.

In the action in which the points above stated were decided, it appeared that the defendant was not only a commission merchant but was also at all times a dealer in fruit and produce in Boston, and that as to three carloads of fruit consigned to him, which he received on paying less than the established interstate charges for freight and refrigeration, he gave no notice that he was not the owner but was only an agent to sell on commission, and there was some evidence that he was the owner. The railroad corporation brought the action against him to recover the balance of the legal charges above the undercharges paid by him. *Held*, that under the circumstances shown the plaintiff had the right to treat the

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defendant as the owner of these three carloads of fruit and that the jury were warranted in drawing the inference and consequently finding that the defendant impliedly agreed to pay the established interstate charges. Following *New York, New Haven, & Hartford Railroad* v. *York & Whitney Co.* 215 Mass. 36.

CONTRACT on an account annexed by a railroad corporation to recover balances, amounting in all to $652.36, alleged to be due for freight and refrigeration charges on certain carloads of cantaloupes, "pie plant" and peaches shipped in interstate commerce and consigned to the defendant at Boston. Writ dated May 16, 1914.

The account annexed contained nine items.

The first item, dated August 31, 1911, was for freight and refrigeration charges on a carload of cantaloupes, $330.69, less paid on account $222.20, leaving a balance of $108.49.

The second item, dated September 1, 1911, was for similar charges on another carload of cantaloupes, $333.05, less paid on account $224.45, leaving a balance of $108.60.

The third, fourth, fifth and sixth items were like the second, except as to the dates, which were respectively September 2, 4, 5 and 11, 1911, and except the amount of the sixth item, which was $331.11, less paid on account $232.35, leaving a balance of $98.76.

The seventh item, dated April 28, 1912, was for icing car containing pie plant, $1.25.

The eighth item, dated September 12, 1912, was for icing car containing peaches, $5.

The ninth item, dated September 13, 1912, was for icing car containing peaches, $5.

The defendant's answer, among other matters, set up a claim in recoupment based on alleged negligence of the plaintiff in computing the freight and other charges upon the shipments set forth in the items of the plaintiff's account annexed.

In the Superior Court the case was tried before *Bell*, J., on an agreed statement of facts and the originals of the freight bills, introduced in evidence by the defendant, of which copies were annexed to the agreed statement of facts, and no further evidence was offered on either side. The substance of the facts stated and the inferences that the jury were warranted in drawing are described in the opinion.

After the parties had rested, the defendant moved that a verdict

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be ordered for the defendant generally and also separately upon each item of the account annexed. The plaintiff also moved that a verdict be ordered for the plaintiff for the full amount claimed in the declaration. The judge refused to make at that time any rulings upon these motions and stated to the counsel that he desired to have the jury pass upon certain issues before making any rulings. Both parties excepted. Thereupon the judge framed and submitted to the jury on all the evidence thirty questions, which, with the answers of the jury, were as follows:

"1. Did or did not the defendant receive the letter from Van Ummersen, general freight agent, dated September 14, 1911?" The jury answered, "Yes."

"2. If the jury answer interrogatory 1 'yes,' on what day was the same received by the defendant?" The jury answered, "September 15."

"3. Was or was not the plaintiff notified by the defendant before delivery to the defendant of any of the six carloads of cantaloupe that the defendant was not the owner of said six carloads, but was merely receiving them in its capacity as commission merchant and as agent for the shipper?" The jury answered, "Yes."

"4. Did or did not the defendant accept the first carload of cantaloupe understanding that the plaintiff looked to the defendant for the payment of all freight and other lawful transportation charges thereon?" The jury answered, "No."

"5. Did or did not the defendant accept the second carload of cantaloupe understanding that the plaintiff looked to the defendant for the payment of all freight and other lawful transportation charges thereon?" The jury answered, "Yes."

"6. Did or did not the defendant accept the third carload of cantaloupe understanding that the plaintiff looked to the defendant for the payment of all freight and other lawful transportation charges thereon?" The jury answered, "Yes."

"7. Did or did not the defendant accept the fourth carload of cantaloupe understanding that the plaintiff looked to the defendant for the payment of all freight and other lawful transportation charges thereon?" The jury answered, "Yes."

"8. Did or did not the defendant accept the fifth carload of

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cantaloupe understanding that the plaintiff looked to the defendant for the payment of all freight and other lawful transportation charges thereon?" The jury answered, "Yes."

"9. Did or did not the defendant accept the sixth carload of cantaloupe understanding that the plaintiff looked to the defendant for the payment of all freight and other lawful transportation charges thereon?" The jury answered, "Yes."

"10. Did or did not the defendant accept the carload of pie plant understanding that the plaintiff looked to the defendant for the payment of all freight and other lawful transportation charges thereon?" The jury answered, "Yes."

"11. Did or did not the defendant accept the carload of peaches described in the eighth item of the account annexed to the declaration understanding that the plaintiff looked to the defendant for the payment of all freight and other lawful transportation charges thereon?" The jury answered, "Yes."

"12. Did or did not the defendant accept the carload of peaches described in the ninth item of the account annexed to the declaration understanding that the plaintiff looked to the defendant for the payment of all freight and other lawful transportation charges thereon?" The jury answered, "Yes."

"13. Did or did not the defendant impliedly agree with the plaintiff to pay the balance of freight and transportation charges, as set forth in the first item of the account annexed to the declaration?" The jury answered, "No."

"14. Did or did not the defendant impliedly agree with the plaintiff to pay the balance of freight and transportation charges, as set forth in the second item of the account annexed to the declaration?" The jury answered, "Yes."

"15. Did or did not the defendant impliedly agree with the plaintiff to pay the balance of freight and transportation charges, as set forth in the third item of the account annexed to the declaration?" The jury answered, "Yes."

"16. Did or did not the defendant impliedly agree with the plaintiff to pay the balance of freight and transportation charges, as set forth in the fourth item of the account annexed to the declaration?" The jury answered, "Yes."

"17. Did or did not the defendant impliedly agree with the plaintiff to pay the balance of freight and transportation charges,

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as set forth in the fifth item of the account annexed to the declaration?" The jury answered, "Yes."

"18. Did or did not the defendant impliedly agree with the plaintiff to pay the balance of freight and transportation charges, as set forth in the sixth item of the account annexed to the declaration?" The jury answered, "Yes."

"19. Did or did not the defendant impliedly agree with the plaintiff to pay the balance of icing charges, as set forth in the seventh item of the account annexed to the declaration?" The jury answered, "Yes."

"20. Did or did not the defendant impliedly agree with the plaintiff to pay the balance of icing charges, as set forth in the eighth item of the account annexed to the declaration?" The jury answered, "Yes."

"21. Did or did not the defendant impliedly agree with the plaintiff to pay the balance of icing charges, as set forth in the ninth item of the account annexed to the declaration?" The jury answered, "Yes."

"22. Is or is not the plaintiff estopped from maintaining its claim against the defendant as set out in the first item of the account annexed to its declaration?" The jury answered, "Yes."

"23. Is or is not the plaintiff estopped from maintaining its claim against the defendant as set out in the second item of the account annexed to its declaration?" The jury answered, "No."

"24. Is or is not the plaintiff estopped from maintaining its claim against the defendant as set out in the third item of the account annexed to its declaration?" The jury answered, "No."

"25. Is or is not the plaintiff estopped from maintaining its claim against the defendant as set out in the fourth item of the account annexed to its declaration?" The jury answered, "No."

"26. Is or is not the plaintiff estopped from maintaining its claim against the defendant as set out in the fifth item of the account annexed to its declaration?" The jury answered, "No."

"27. Is or is not the plaintiff estopped from maintaining its claim against the defendant as set out in the sixth item of the account annexed to its declaration?" The jury answered, "No."

"28. Is or is not the plaintiff estopped from maintaining its claim against the defendant as set out in the seventh item of the account annexed to its declaration?" The jury answered, "No."

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"29. Is or is not the plaintiff estopped from maintaining its claim against the defendant as set out in the eighth item of the account annexed to its declaration?" The jury answered, "No."

"30. Is or is not the plaintiff estopped from maintaining its claim against the defendant as set out in the ninth item of the account annexed to its declaration?" The jury answered, "No."

Both parties excepted to the rulings of the judge that there were issues of fact to be submitted to the jury, but no question was raised and no objection was made to the form of the questions so submitted.

Both parties asked the judge to make certain rulings, some of which he made and some of which he refused, subject to the exception of the requesting party.

After the answers of the jury had been received the defendant filed a motion that certain of the answers be set aside and the issues on which they were given be discharged. The judge, after hearing, denied the motion.

The judge ruled that the plaintiff could not recover on the first item of the account annexed, but ordered a verdict for the plaintiff on the remaining eight items amounting to $543.87 principal and $175.13 interest, making a total of $719.

After the return of the verdict as ordered and before the recording thereof, the judge reserved leave, with the consent of the jury, to enter a different verdict if, upon the exceptions taken or the questions of law reserved, this court should decide that such different verdict should have been entered. Thereupon by the agreement of both parties the judge reported all questions of law raised upon the record for determination by this court. If his rulings were correct judgment was to be entered for the plaintiff on the verdict, but if his rulings in whole or in part were wrong such judgment was to be entered or order made as ought to have been entered or made.

W. L. Parsons, for the plaintiff.

A. L. Taylor, for the defendant.

RUGG, C. J. This case comes before us on a report, which states that it was tried before a jury on an "Agreed Statement of Facts," which covers with its exhibits more than twenty printed pages. Several of its paragraphs begin with the statement that certain persons "will testify" as narrated. The report fur-

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ther says that the defendant "introduced in evidence the original freight bills. . . . There was no further evidence offered by either side." It follows that the case was tried upon the statement of agreed facts submitted as evidence, which, together with the other evidence, was the basis from which the ultimate decisive facts so far as necessary must be determined. Where more than one rational inference can be drawn from these, a question of fact is presented. It is when only one conclusion is possible that a point of law alone is raised. *Frati* v. *Jannini*, 226 Mass. 430, 432. *Atlantic Maritime Co.* v. *Gloucester*, 228 Mass. 519, 522, 523. See *Donahoe* v. *Turner*, 204 Mass. 274.

This is an action of contract to recover a balance claimed to be due for freight and refrigeration charges on various carloads of produce shipped in interstate commerce and consigned to the defendant at Boston. The plaintiff as the terminal carrier failed to collect the full amount of the correct tariff rates at the time of delivery. One group of the shipments relates to six carloads of cantaloupes originating at Payette, Idaho. "Straight Bills of Lading" in the form established by the interstate commerce commission were issued for those cars, each signed by the shipper and by the agent of the carrier, but they all were retained by the shipper, never came into the possession of the defendant, and it had no actual knowledge that any had been issued or of the terms thereof. Immediately upon being informed of the arrival of the first of these six cars, an agent of the defendant inquired of an agent of the plaintiff what the freight charge was, saying also that the six carloads of cantaloupes expected by the defendant from Payette, Idaho, "were commission goods and that the defendant wished to know what the charges would be before it decided to accept the consignment." Information later was given to the defendant that the rate was $222.20, which was $108.49 less than the lawful rate established by the tariffs filed with the interstate commerce commission.

It is not now open to discussion that the rates published according to the requirements of the federal interstate commerce act are absolutely binding upon all persons who are parties to a contract of interstate transportation. They have the force of a statute. They cannot be varied under any pretext. The carrier cannot lawfully depart from them. It was said in *Kansas City*

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Southern Railway v. *Carl*, 227 U. S. 639, at page 653, "Neither the intentional nor accidental misstatement of the applicable published rate will bind the carrier or shipper. The lawful rate is that which the carrier must exact and that which the shipper must pay. The shipper's knowledge of the lawful rate is conclusively presumed." It was "the purpose of the act to have but one rate, open to all alike and from which there could be no departure." *Louisville & Nashville Railroad* v. *Maxwell*, 237 U. S. 94, and cases collected at page 97. *Dayton Coal & Iron Co. Ltd.* v. *Cincinnati, New Orleans & Texas Pacific Railway*, 239 U. S. 446. *Pennsylvania Railroad* v. *International Coal Mining Co.* 230 U. S. 184, 197. It was said in *Erie Railroad* v. *Stone*, 244 U. S. 332, at page 336, "The rules and regulations, duly published and filed, which in any wise affect the rates or the value of the service to be rendered are controlling upon both parties to the shipping contract. (Act of June 29, 1906, 34 Stat. 586, § 2.) The binding force of these contracts and regulations has been affirmed in many cases." *Boston & Maine Railroad* v. *Hooker*, 233 U. S. 97, 112. *Pierce* v. *Wells Fargo & Co.* 236 U. S. 278, 284, 285. *Southern Railway* v. *Prescott*, 240 U. S. 632, 638.

The question is, whether these rates are binding upon a consignee who is not a party to the bill of lading, who notifies the carrier that he is not the owner of the goods transported, but merely an agent to dispose of them on commission, and who decides, after having had stated to him by the carrier the amount of charges said by it to be due, whether he will receive or decline to accept the consignment. More broadly stated the question is, whether everybody who deals with an interstate shipment, although not the owner of the goods, is bound inexorably to know and to pay the lawful and correct rates established by the tariffs filed and published in compliance with the interstate commerce act, even though he is not a party to the shipment, is not bound to pay any rate at all except by his own volition exercised after the shipment is in progress or at an end, and decides to pay only on the assumption that the charge stated by the carrier is the extent of his obligation. This point relates to the interpretation of an act of Congress, respecting which a decision by the Supreme Court of the United States is final and binding upon all other courts. This precise point has not been decided by that court so far as we are

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aware. We must, therefore, decide it upon what appear to be the governing principles of law in the light of the decisions of that tribunal upon kindred and analogous questions.

The decisions already cited have settled that parties to an interstate shipment or carriage are bound, the carrier to collect and the shipper or owner to pay, the lawful rate no matter what mistake or misunderstanding may have entered into any statement of the rate. Congress has determined that the true and lawful rate, fixed according to the methods prescribed by it, shall have the force and effect of a statute and shall be immutable by any conduct of the parties. That principle has been stated in the strongest possible form of expression.

There is ground for holding that the same principle should apply to all persons who may seek to deal with goods transported by interstate carriage to the extent of paying the charges for transportation. The purpose of the act being, as has been stated many times in various forms of words, to prevent utterly any discrimination between different shippers in interstate commerce, and to put everybody absolutely upon the same footing as to the rates in interstate commerce, there is much to be said in favor of the proposition that everybody, whether a party or a stranger to the contract for shipment, must pay the one and only legal rate if he undertakes to pay any rate at all. It may be that the evil of discrimination in rates can be exterminated only by such drastic interpretation.

But the reasons against this view seem to us stronger. Transportation of goods in interstate commerce rests upon contract. Nobody is under legal compulsion to enter into such a contract. It is an economic adventure. Whether one shall enter into it depends in large measure, if not entirely, upon business considerations and a determination whether it will be profitable or not. After one enters into such a contract, he is bound by law as to the rate. The shipper both theoretically and practically has within his reach the facilities for ascertaining the lawful rate, because every carrier is required by section 6 of the act (as amended by the act approved June 29, 1906) to keep schedules of rates and charges "posted in two public and conspicuous places in every depot, station, or office . . . where passengers or freight, respectively, are received for transportation, in such form that they shall be

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accessible to the public and can be conveniently inspected." It is true that the schedule becomes operative upon filing with the interstate commerce commission and furnishing copies to its officers even though not thus publicly posted. *Texas & Pacific Railway* v. *Cisco Oil Mill*, 204 U. S. 449, 451 n.

But it is the theory of the law that opportunity to ascertain the true rate must be open to one who wants to make a contract, the profit or loss of which may depend wholly upon the rate. The shipper is a necessary party to the contract for interstate shipment. Goods cannot be carried unless some one sends them. He must be bound to pay the lawful rate, unless by the contract of transportation, manifested usually by the bill of lading, he is not liable for any rate. But the consignee is not a necessary party to a contract for interstate shipment. The same opportunity is not or may not be open to him under the law to ascertain the true and lawful rate. That is illustrated by the facts in the case at bar. No through rate had been established on cantaloupes from Payette, Idaho, to Boston. So far as known, melons had never before been shipped from Idaho to Boston. The lawful rate could be found only by adding the rate of the Oregon Short Line Railroad from Payette to Chicago, and the rates of the Lake Shore and Michigan Southern Railroad and other railroads from Chicago to Boston. Those rates were to be found by examination of the tariffs issued by these several railroads. It is common knowledge that neither of these railroads above named maintain tracks in this Commonwealth, and hence there is no place here where these rates are required by the law to be posted publicly. No practicable means, therefore, were open to the defendant to ascertain the lawful rate on the carload of perishable goods such as cantaloupes within such time as would enable it to receive and sell the goods before they would become worthless. It never had had anything to do with the shipper. The whole question, whether it could afford to receive the cantaloupes on consignment, depended on the freight charges to be paid. Under these circumstances, the only way in which the business could go forward was for it to take the word of the carrier as to the charge to be paid.

It seems to us more rational to hold that the inexorable provisions of the federal law as to rates are applicable only to those who expressly or by implication are or become parties

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to the contract of transportation. Whether one is or has become a party to that contract must be determined by the general principles of the common law. As was said in *Cincinnati, New Orleans & Texas Pacific Railway* v. *Rankin*, 241 U. S. 319, 326, 327, "The shipment being interstate, rights and liabilities of the parties depend upon acts of Congress, the bill of lading, and common law rules as accepted and applied in federal tribunals." A consignee who is not the owner of goods, and who is to receive them only on commission, and who notifies the carrier to this effect, is not thereby necessarily a party to the contract of carriage. It was said by Chief Justice Bigelow in *Boston & Maine Railroad* v. *Whitcher*, 1 Allen, 497, at page 498, "no case can be found which goes the length of holding, that an agent is liable for the freight of goods sent to and received by him, when his agency is known to the carrier at the time of the delivery of the goods, and when there is no stipulation in the contract of transportation by which the consignee is to pay the freight. In such a case, the essential elements of a contract are wanting. There is nothing from which an intent on the part of the shipper or carrier to charge the agent, or an agreement by the agent to pay the freight, can be inferred. A mere naked consignment to an agent does not make him liable for the freight, where the agency is known, and there is no stipulation that the consignee shall pay freight." *Old Colony Railroad* v. *Wilder*, 137 Mass. 536.

The bill of lading as to the first car never was sent to the defendant, and it did not know its terms. Since it is required by § 20 of the act as amended by the Carmack amendment, (34 U. S. Sts. at Large, 593,) that a bill of lading or receipt must be issued by the carrier, the defendant must be presumed to know that. But the defendant cannot be presumed to know the terms of the bill of lading. If it be assumed in favor of the plaintiff that the defendant was bound to know also the terms of the uniform bill of lading, that would not go far enough to hold the defendant to pay the lawful rate. A uniform bill of lading for interstate shipments was established by the report of the interstate commerce commission in the matter of Bills of Lading, 14 I. C. C. Rep. 346, but it there was said at page 349 that this "bill of lading is designed for use in connection with the movement of miscellaneous freight and general merchandise and as a substitute

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for the bills now in use in the carriage of this description of property. It is not intended to take the place of special bills of lading which are issued on particular commodities of such a nature or so handled as to require exceptional provisions, such as live stock, for example, and perhaps perishable property." The goods here in question were perishable. There is nothing in this record to show that the defendant knew or had reason to know that the uniform bill of lading was issued in this instance and that a special bill different in form as applicable to perishable goods might not have been used by the shipper and receiving carrier. The defendant told the plaintiff that it was receiving these goods not as owner but merely on commission, and that it would not accept them until the plaintiff informed it upon what terms it would release the goods to it. When those terms were stated, it accepted them. Its agreement was not a general one to pay the legal tariff, but a special agreement to pay only the amount demanded. *Central Railroad of New Jersey* v. *MacCartney*, 39 Vroom, 165. *Central of Georgia Railway* v. *Southern Ferro Concrete Co.* 193 Ala. 108. Its determination whether it would receive or decline the consignment, a determination which it had an unrestricted right to make either way without violating any duty to anybody, depended upon the amount demanded of it for charges. The defendant had no interest in the contract between the shipper and the carrier. For aught the defendant knew or was required to know, the acceptance from it of this payment by the carrier, if it should turn out to be partial, would not affect the carrier's right to collect the balance from the shipper, who was under the primary liability as shipper and owner. See *Georgia, Florida & Alabama Railway* v. *Blish Milling Co.* 241 U. S. 190, 197. The clause in the bill of lading was that the "owner or consignee" should pay the freight. But the defendant did not claim nor receive the goods under the bill of lading. The bill of lading issued to the shipper was not an "order" but a "straight" bill of lading and never came to the possession of the defendant and it did not know its terms. It is not necessary to consider what would be the rights and obligations of these parties if the bill of lading had contained the express stipulation that the consignee alone should pay the freight as a condition precedent to delivery to him.

As to the first car of cantaloupes, the plaintiff expressly states

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in its argument and brief that it "does not base its claim on an implied agreement arising at common law, but on the interstate commerce act and the interstate bill of lading." We are of opinion, therefore, that under the circumstances here disclosed it cannot recover from the defendant on this item.

The facts are different as to the other five cars of cantaloupes in this particular: The defendant wrote to the freight traffic manager of the plaintiff, asking for the rates on cantaloupes under refrigeration from Payette, Idaho, to Boston, with references to the tariffs. A reply was made to this letter by the plaintiff's general freight agent,* giving the correct rates, with specific references to the published tariffs. It was found by the jury upon adequate facts that this letter of information was received by the defendant before it accepted any of the other five cars of cantaloupes. *Marston* v. *Bigelow*, 150 Mass. 45, 53, 54. The traffic manager and the general freight agent both were higher in authority than the freight agent at the Kneeland Street freight office and others there employed, who stated to the defendant the amount of the freight charges on the successive cars as they arrived. The plaintiff was obliged under the law to state accurately in writing the applicable rate in response to the defendant's request. Act of Congress approved June 18, 1910, c. 309, § 9, amending § 6 of the original act (U. S. St. 1887, c. 104). 36 U. S. Sts. at Large, 548. Hence, this statement being correct, the defendant was bound to know that it was authoritative. The defendant, therefore, had at hand the lawful freight rate on these cars. By simple computation it could have ascertained the lawful charges and by comparison it could have discovered that the charges set forth in the plaintiff's statement were too small. It was bound to know, also, that the only charge which the plaintiff lawfully could make was that established by the published tariff. Its inquiry as to the legal rate in this connection bears some indication that it expected to pay that rate if it took the goods. The writing of the letter of inquiry and the receipt of the reply with the correct information, in conjunction with the other circumstances, was a sufficient basis for the finding that the defendant, although agent and not the owner of the last

* This is the letter referred to in the first special question submitted to the jury printed on page 209.

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five carloads of cantaloupes, knew and expected to pay the legal rates, and accepted them understanding that the plaintiff looked to it for the payment of the legal charges. In respect to these five cars, the principles stated and applied in *New York, New Haven, & Hartford Railroad* v. *York & Whitney Co.* 215 Mass. 36, are controlling. *Pennsylvania Railroad* v. *Titus*, 216 N. Y. 17. The defendant knew what the legal rate was from this definite and detailed statement by the general officer of the plaintiff. It had the references to the tariffs on file. It had asked for the charges orally of an employee of the plaintiff of inferior rank and had been given a different and lower figure. It knew that if the plaintiff released the goods, its lien was gone and it would be relegated to its rights against the shipper in a distant State, who had contracted with a different carrier. The inference is warranted from these facts that acceptance of the consignment constituted by implication an agreement to pay the lawful freight rate.

The facts that it had been customary heretofore, when an undercharge had been made and subsequently the mistake had been discovered and a bill for the undercharge sent by the plaintiff to the defendant, the latter had returned it with the statement that the account with the shipper had been closed and the defendant had no funds, were not decisive and were to be weighed with all the other evidence in determining the ultimate fact whether the defendant had agreed impliedly to pay the lawful rate. The same is true as to the fact that "Some time prior to September, 1911, the plaintiff sent to the defendant a request that the defendant execute with the plaintiff a contract, by the terms of which the plaintiff would agree that the defendant might be upon its weekly credit list, and, in consideration for this privilege, the defendant would agree with the plaintiff to pay the plaintiff all lawful charges for freight and other incidental expenses upon goods which might be consigned to the defendant at Boston, Mass., but the defendant expressly declined to sign such contract, and then informed the plaintiff that such contract would be disastrous to it since oftentimes it refused to accept consignments of highly perishable property sent to it at Boston, Mass., where the condition of the goods, the state of the market, and the responsibility of the shipper, or any of them, were not satisfactory to the defendant, and from that time to the present time the plaintiff has allowed the defendant

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to accept goods without paying the charges in advance, but the plaintiff has on the same day rendered the defendant a bill for the charges, and the same has been immediately paid." This also was not conclusive, but was to be considered in determining whether by fair inference the defendant had agreed to pay the lawful rate on these particular cars.

The salient facts, in addition to those already stated, relating to the other group of charges, are these: One carload of pie plant and two carloads of peaches were shipped in interstate commerce to the defendant as a commission merchant, and it had no other interest in them except to sell the goods for the shippers and remit the proceeds after deducting its disbursements and commission. This fact was not communicated to the plaintiff. The defendant immediately paid to the plaintiff the amount of freight charges demanded of it, sold the goods, all of which were perishable, and remitted to the shipper the balance due after making the proper deductions, including the freight charges paid to the plaintiff. Later the plaintiff discovered that the charges collected of the defendant were too small and less than the lawful rate established under the interstate commerce act by reason of the unintentional omission of certain icing charges. It is sought now to recover the amount alleged to be the balance due by reason of those undercharges.

The defendant was at all these times a dealer in fruit and produce in Boston. A large part of its business was done as a commission merchant. But apparently its business was not exclusively of this character. Produce dealers throughout the country ship to the defendant and other produce dealers in Boston perishable fruit and produce for sale on commission at market prices. The defendant receives such shipments from persons entirely unknown to it. Perishable goods must be sold at once to avoid serious loss. It is "a custom of the trade among fruit and produce dealers at Boston, Mass., and especially commission merchants dealing in these goods, immediately to sell goods so consigned to them at the best market price and to remit the net amount received from such sales to the consignor, after deducting all known charges on said goods, and a successful conduct of the commission business especially requires immediate remittances." The bills of lading issued were "straight" and not "order," and were retained by the shippers and not sent

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to the defendant. Whether the defendant impliedly agreed to pay the lawful rate established by law was in our opinion a question of fact to be determined by fair inference from the agreed facts. The defendant was the consignee of all these goods. That was some evidence that it was owner. *Rosenbush* v. *Bernheimer*, 211 Mass. 146, and cases collected at page 149. That being a general principle of commercial law, the relations of the parties may be presumed to have proceeded on the footing that each had a right to rely upon it and knew that the other had a like right. The defendant sometimes had notified the plaintiff that it was receiving goods on commission merely, but did not give such notice with respect to the three cars here in issue. The defendant knew also that an inexorable and immutable rate was established by law, which the carrier was bound to charge to somebody, and that it might incur serious liability for failure to collect. That factor alone may the more readily incline the mind to the belief that both parties were dealing with each other on the footing that the lawful rate was to be collected. The defendant further knew that by releasing the goods from its custody the carrier would lose its lien and would be remanded to its contract rights if it should turn out that there had been an undercharge. As was said by Chief Justice Holmes in *Spencer* v. *Spencer*, 181 Mass. 471, at page 473, "Of course it does not matter whether the defendant expected to pay . . . or not, the question is as to the natural import of his overt acts. *Bohn Manuf. Co.* v. *Sawyer*, 169 Mass. 477. *Hobbs* v. *Massasoit Whip Co.* 158 Mass. 194, 197. Again, it is not necessary that the defendant should have believed that the plaintiff expected pay. If as a reasonable man he should have understood from what he knew that such was the expectation, he would be bound."

The only essential difference between the claim for the balance above the undercharge on the first car of cantaloupes and those on these three cars, is that as to the former the defendant gave express notice to the carrier that it was not owner but simply commission merchant, while as to the latter it gave no notice but left the carrier to infer what it naturally might from the fact that it was consignee. But that difference appears to be enough to justify as matter of law a different conclusion. In *Pennsylvania Railroad* v. *Titus*, 216 N. Y. 17, it was said at page 21, respecting liability for freight rates upon a shipment in interstate commerce,

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"As to the plaintiff, the defendant stood in the relation of owner of the peaches. The bills of lading designated him as the consignee and did not disclose his agency or the ownership of Franklin, nor did he notify the plaintiff before it delivered the peaches of either of such facts. At the time of the delivery the plaintiff did not have knowledge or notice, express or inferential, that the defendant was not the owner. Under those conditions, the plaintiff had the right, as a matter of law, to regard and deal with the consignee as the owner of the peaches, and the consignee in permitting the plaintiff to so deal with him agreed, through implication, that he would pay the plaintiff's lawful charges for transporting and delivering the peaches to him. The consignee was the presumptive owner and when he accepted the peaches and had not informed the plaintiff and the plaintiff did not have knowledge or notice before the delivery that he was a factor or agent and that his acceptance of them would be in that capacity, he by the acceptance obligated himself to pay the unpaid legal charges of transportation. . . . The obligation arose from the presumptive ownership, the acceptance of the goods and the services rendered and benefits conferred by the plaintiff for charges made and to be paid." A decision to the contrary upon this point is, *Central of Georgia Railway* v. *Southern Ferro Concrete Co.* 193 Ala. 108. The judgment in that case is rested chiefly upon *Central Railroad of New Jersey* v. *MacCartney*, 39 Vroom, 165, 173. No reference is made in the opinion in the latter case to the interstate commerce act, and the decision proceeds seemingly upon the footing that it was an intrastate shipment. It seems to us that a different inference under those circumstances might be required by law or at least be permissible by a jury.

The present record does not render the liability of the defendant a pure question of law. The deductions which ought to be drawn from all the facts, which were submitted, were for the jury. No exception has been alleged to the general instructions given. In view of all these conditions, we think the inferences drawn by the jury as shown by their answers, to the effect that the defendant impliedly agreed to pay the lawful charges, cannot be pronounced irrational. This branch of the case falls within the principles stated in *New York, New Haven, & Hartford Railroad* v. *York & Whitney Co.* 215 Mass. 36.

The facts which have been narrated dispose of the contention

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that the plaintiff is estopped as matter of law to assert its claim to the balance unpaid by reason of the undercharges. They do not go to the length of warranting that ruling as matter of law. For the same reasons the defendant can have no recoupment.

No reversible error is disclosed by the manner in which the judge dealt with the several requests for instructions. The verdict was directed rightly upon the answers returned by the jury.

In accordance with the terms of the report, let the entry be

Judgment for the plaintiff on the verdict.

THOMAS J. SHANNON *vs.* SHEPARD MANUFACTURING COMPANY, INCORPORATED, & another.

Middlesex. December 6, 1917. — May 24, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Receiver. Bankruptcy. Jurisdiction. Attorney at Law, Counsel fees.

Where at the time of the filing of a petition in bankruptcy the property of the bankrupt was in the hands of a receiver appointed by the Superior Court, that court has jurisdiction to settle the accounts of its receiver relating to his charge of the property up to the time of the adjudication in bankruptcy some months after the filing of the petition.

Upon a petition to the Superior Court, alleging that the debts of a certain corporation carrying on an established manufacturing business were not being paid although its assets were sufficient for that purpose and containing no allegation of insolvency, that court appointed a receiver to conserve the assets and conduct the business of the corporation. About a month later a petition in bankruptcy was filed in a federal court against the corporation. About five months after that the corporation was adjudicated a bankrupt and a trustee in bankruptcy was appointed. Thereupon the receiver appointed by the Superior Court, who up to that time had operated the business of the corporation with the knowledge and consent of all persons interested, turned over to the trustee in bankruptcy all the assets of the bankrupt in his hands, excepting cash and bills receivable due to the receiver and such other assets as by agreement between the trustee and the receiver could be handled and turned into cash more advantageously by the receiver. A decree of the Superior Court was made recognizing and confirming this arrangement and this decree was assented to expressly by the trustee. Another decree of the Superior Court reciting these facts and by reason of them reducing the bond of the receiver also was assented to by the trustee. Upon a petition in the Superior Court for the allowance of the final account of the receiver, the trustee in bankruptcy appeared by counsel and the only objection raised was in regard to the amount charged by the receiver for his services. A decree was entered, entitled a final decree, settling the receiver's accounts,

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approving the payments made by him both before and after the filing of the petition in bankruptcy but before the appointment of the trustee in bankruptcy, approving bills for services of counsel rendered to the receiver and ordering them paid, determining the amount of the receiver's compensation, fixing the amount to be paid to the surety on his official bond and directing him to transfer and deliver to the trustee all property of the bankrupt remaining in his hands after making these payments. The trustee in bankruptcy appealed from this decree on the ground that the allowance of the sums to be paid as compensation to the receiver and his attorneys was beyond the jurisdiction of the court. *Held*, that the Superior Court, which rightly appointed the receiver, had jurisdiction of all questions relating to his accounting and final discharge, including the fixing of the amounts of compensation for him and his attorneys.

In the case above described, in which the evidence was not reported, it was *held* that, in the absence of any evidence, the charges for compensation could not be pronounced to be excessive and that the finding of the Superior Court on that question of fact could not be set aside.

In fixing the amount to be allowed to the receiver for expenses incurred for counsel fees it was *held* to have been proper to allow the amount of compensation paid to counsel for services rendered for the common benefit of the persons interested in bringing the original bill in equity upon which the receiver was appointed.

APPEAL, by the trustee in bankruptcy of the estate of the Shepard Manufacturing Company, Incorporated, a corporation, from a decree of the Superior Court dated July 20, 1916, allowing the account of Arthur F. Whalen, Esquire, as the receiver of the property of that corporation.

The appeal was heard by *Sisk*, J., who filed a finding of facts relating to the decree appealed from, which contained the facts that are stated in the opinion. The judge reported the case for determination by this court in the following report:

"In the above entitled case, by my direction, a decree entitled 'Final Decree' was entered on July 20, 1916. On January 23, 1917, Edward C. Mason, Esquire, as trustee in bankruptcy of said defendant corporation, filed a petition in said case entitled 'Petition for Order to Receiver,' in substance contending that this court was without jurisdiction to allow the account of Arthur F. Whalen, Esquire, its receiver in said case, and praying that said decree of July 20, 1916, entitled 'Final Decree' may be vacated; that said Whalen, the receiver in this court, be ordered to deliver to said petitioner, as trustee in bankruptcy of the defendant corporation, all the assets and property of said defendant corporation, and that said receiver be ordered to account in the United States District Court for the District of Massachusetts sitting in bankruptcy, to said petitioner, trustee as aforesaid, for all assets and

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property of said defendant corporation on June 11, 1915, the day when a petition in bankruptcy was filed against said defendant corporation. This petition was duly heard by me, and was argued by counsel. No evidence was introduced by either party, and I thereupon caused to be entered an order denying the petition.

"I have this day filed a finding of all the material facts found by me in connection with said decree filed July 20, 1916.

"Inasmuch as it may be claimed that said decree entered July 20, 1916, was in fact an interlocutory decree, and being of the opinion that said decree so affects the merits of the controversy that the matters involved therein ought, before further proceedings, to be determined by the full court, I now report all questions arising under said decree under the provisions of R. L. c. 159, § 27, and under any other statutes authorizing me to reserve and report the case."

H. Williams, Jr., for the trustee in bankruptcy.

J. T. Hughes, (*P. Mansfield* with him,) for the receiver.

RUGG, C. J. The plaintiff, a stockholder in the defendant corporation, in behalf of himself and all other stockholders and creditors who might wish to join, filed against it in the Superior Court this suit in equity with appropriate allegations to the effect that under the management of its officers the debts of the corporation were not being paid although its assets were sufficient, and praying for the appointment of a receiver to carry on its business. There were no allegations of insolvency, but the contrary. On May 4, 1915, Arthur F. Whalen was appointed receiver to conserve the assets and to conduct the business of the corporation. He qualified, gave a large bond and took possession of the property. He operated the business of the corporation from May 4, 1915, until December 9, 1915, employing from thirty-five to seventy men. The business was that of a wholesale manufacturer and jobber of silverware, and had been in existence about thirty years. For a considerable period it was the purpose and effort of the receiver, with the concurrence of all parties in interest, to put the business in such condition that it might be sold as a going concern. On June 11, 1915, a petition in bankruptcy was filed in the federal court against the corporation by some of its creditors. This petition was somewhat contested and the corporation was not adjudicated a bankrupt until November 24,

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1915, when Edward C. Mason was appointed receiver in bankruptcy by the Federal court. On December 17, 1915, he was elected and qualified as trustee in bankruptcy. Whalen, as receiver, operated the business of the corporation with the knowledge and consent of Mason "during the period from November 24, 1915, to December 9, 1915, the date when the property of the bankrupt (except bills receivable and cash) was turned over to Mason as receiver. Pursuant to an oral agreement with Mason, Whalen, as receiver, continued to operate the business of the corporation for a period from December 9, 1915, until about the middle of January, 1916, when it was closed. Whalen made no charge for any services rendered by him during that period (December 9, 1915, to the middle of January, 1916)." On December 9, Whalen, as receiver of the Superior Court, surrendered to Mason, then receiver in the bankruptcy court, the business, plant, machinery, equipment and list of accounts receivable of the corporation, retaining his own accounts receivable as receiver, together with cash in hand, for the purpose of covering his disbursements, expenses and compensation. A decree of the Superior Court was entered on June 3, 1916, as of December 9, 1915, whereby said Whalen as receiver was authorized to deliver to said Mason, as receiver, or as trustee in bankruptcy, of the defendant corporation, "the real estate, machinery, merchandise, equipment and all the other assets of the defendant corporation in his hands and possession, excepting only cash, the bills receivable, due said Whalen as receiver, and such other assets, such as sample accounts, as by agreement between said Whalen and said Mason may be more conveniently handled or turned into cash by said Whalen." This decree was assented to by the attorney for Mason as trustee. On June 3, 1916, an interlocutory decree was entered as of May 1, 1916, which recited that Whalen, receiver, had turned over to Mason all of the assets of the defendant corporation in his possession, excepting certain cash and property now converted into cash, in all amounting to less than $9,000. It was thereupon ordered that the bond of Whalen as receiver be reduced from $100,000 to $10,000, with sureties. This decree was assented to by the attorney for Mason as trustee. On June 16, 1916, Whalen filed his petition for the allowance of his final account and report as receiver. An order of notice was

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issued thereon to Mason, trustee in bankruptcy, returnable on June 19, 1916. Service of this order was accepted by the attorney for the trustee. At the hearing on this petition, the trustee appeared by his attorney and the only objection raised was to the amount claimed by the receiver for his services. A decree entitled "Final" was entered on July 20, 1916, settling the receiver's accounts, approving payments made by him both before and after the filing of the petition in bankruptcy, but before December 8, 1916, approving bills for services of counsel rendered to him as receiver during the period of his receivership, and ordering them paid, determining his own compensation for the period between May 4 and December 9, fixing the amount to be paid to the surety on his official bond, and directing him to transfer and deliver to the trustee all property of the bankrupt in his hands remaining after making these payments. On June 16, 1916, Whalen, as receiver, filed in the Superior Court a suggestion of the adjudication in bankruptcy and the appointment of Mason as trustee. So far as appears of record, this was the first time that the bankruptcy proceedings were called to the attention of the State court although the bankruptcy was recited in the decree entered on June 3, 1916. Mason did not file any appearance in the Superior Court, or ask to intervene or petition for transfer to him of the property in the hands of the receiver until August 9, 1916, when he filed a petition for leave to intervene. In that petition he set forth the filing of the petition in bankruptcy, the adjudication, and his appointment and qualification as trustee, the filing of the report of the receiver asking for the fixing of his compensation and for allowances to his attorneys, the entry of the decree of July 20, 1916, and prayed for leave to appeal from that decree on the ground that the allowance of the sums as compensation to the receiver and his attorneys was beyond the jurisdiction of the court. That petition does not appear from the record to have been allowed specifically, but since the trustee was permitted to appeal from the decree of July 20, it may be treated as having been allowed. On January 23, 1917, Mason as trustee filed in the Superior Court a petition entitled "Petition for Order to Receiver," which recited briefly the previous proceedings and alleged that the allowance of the account of Whalen as receiver was beyond the jurisdiction of the court and prayed that the

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decree of July 20, 1916, be vacated, and that the receiver be ordered to account to the bankruptcy court for all assets and property of the corporation on June 11, 1915, the date of the filing of the petition in bankruptcy. No evidence was introduced on this petition and it was denied and the case was reported, if the decree of July 20, 1916, was not a final decree.

We are of opinion that that was a final decree. It was final at least to the extent of permitting an interested party to appeal from it. *Gerrish* v. *Black*, 109 Mass. 474, 477. *Forbes* v. *Tuckerman*, 115 Mass. 115, 119. *Hill* v. *Chicago & Evanston Railroad*, 140 U. S. 52. Opinion by Chief Justice Fuller in *Hoffman* v. *Knox*, 50 Fed. Rep. 484, at page 489. If it be a final decree, then the Superior Court had no right further to deal with it except upon a bill of review. *White* v. *Gove*, 183 Mass. 333, 340. *Lakin* v. *Lawrence*, 195 Mass. 27, 28. *Fairbanks* v. *Newhall*, 222 Mass. 598.

Nothing in the account appears to turn on the period elapsing between the date of adjudication of bankruptcy and of the actual turning over of assets by the receiver to the trustee. No argument has been made on that point and it is laid on one side.

It has not been contended that the services of Whalen as the receiver were not of value in preserving and managing the estate of the bankrupt. Indeed, the only suggestion made by the trustee at the hearing in the Superior Court was that the amount claimed for his services in that connection was too large, not that the receiver ought not to be paid.

The question presented for decision is whether the Superior Court had jurisdiction to enter the decree of July 20, allowing the accounts of the receiver, fixing his compensation and ordering payment of the fee for the surety upon his bond. Although this question was not raised at the time that decree was entered, it will be considered because it is the duty of the court to consider whether it has jurisdiction at whatever stage the objection may be presented, or of its own motion if not raised by a party. *Boston Bar Association* v. *Casey*, 227 Mass. 46, and cases collected at page 50.

The contention that the Superior Court was without jurisdiction to enter the decree of July 20, 1916, is founded on the proposition that the adjudication of bankruptcy made on November 24, 1915, related back to the time of filing the petition in bank-

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ruptcy on June 11, 1915, and divested the receiver appointed by the Superior Court of all jurisdiction in the premises and drew into the jurisdiction of the bankruptcy court all matters pertaining to the administration of the property.

The appointment of the receiver was made lawfully by the Superior Court. It was not an act of bankruptcy as to the corporation, for the reason that there was no allegation of insolvency, but on the contrary the bill alleged that the assets were sufficient to pay the debts of the corporation. *In re William S. Butler & Co. Inc.* 125 C. C. A. 223; 207 Fed. Rep. 705. *Maplecroft Mills* v. *Childs*, 141 C. C. A. 245; 226 Fed. Rep. 415. The Superior Court is a court of general jurisdiction in law and in equity. The custody of all the property was rightly in the receiver when the petition in bankruptcy was filed. His entire conduct, at least before that time, was subject to the jurisdiction of the Superior Court. All this is indubitable and is conceded by the trustee.

Since the question here in issue depends upon the scope of an act of Congress and the jurisdiction of the District Court of the United States in bankruptcy, decisions of the Supreme Court of the United States are binding upon all other courts of the nation. It seems to us that the point now raised is concluded by the authority of such decisions. The case of *In re Watts*, 190 U. S. 1, involved a consideration of the rights and duties of the receiver of a State court respecting property of one subsequently adjudged a bankrupt. It was said at page 35, "It has been already assumed that the bankruptcy proceedings operated to suspend the further administration of the insolvent's estate in the State court, but it remained for the State court to transfer the assets, settle the accounts of its receiver and close its connection with the matter. Errors, if any, committed in so doing could be rectified in due course and in the designated way." This statement does not appear to be susceptible of any other meaning than that the State court has jurisdiction over such issues arising on the receiver's account as the amount of his compensation and the fees of his counsel. Jurisdiction implies authority to decide. *The Fair* v. *Kohler Die & Specialty Co.* 228 U. S. 22, 25. It was held, also, in *Louisville Trust Co.* v. *Comingor*, 184 U. S. 18, that the State court had jurisdiction to pass upon the fees of its receiver and his attorneys before the petition in bankruptcy was filed.

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The inference seems irresistible that power of the State court "to settle the accounts of its receiver" involves of necessity the power to determine his compensation and all his other obligations assumed and expenses incurred, so far as is not inconsistent with the paramount title of the trustee and his general right of possession. The authority of the receiver, acting under the order of the local court, to make a sale of property in his custody because it was "of a perishable nature, and liable to be lost or diminished in value before the final adjudication of the case," was challenged in *Jones* v. *Springer*, 226 U. S. 148, on the ground that, although the sale was made on June 26 and confirmed by order of court on July 17, a petition in bankruptcy was filed on March 12 and the owner of the property was adjudged a bankrupt on April 23. In denying the soundness of the contention that jurisdiction was vested exclusively in the bankruptcy court, it was said at page 155, "It is true that the estate is regarded as *in custodia legis* from the date of the petition as against a subsequent attachment. *Acme Harvester Co.* v. *Beekman Lumber Co.* 222 U. S. 300, 306, 307. But in a case like the present where, under an attachment levied before the petition was filed, the property had been put into the hands of a receiver, without notice of the petition, it is not true that all power and jurisdiction of the local court were ended before notice of the bankruptcy proceedings. *Eyster* v. *Gaff*, 91 U. S. 521, 524, 525. *Scott* v. *Ellery*, 142 U. S. 381, 384. *Jaquith* v. *Rowley*, 188 U. S. 620, 626. *Revere Copper Co.* v. *Dimock*, 90 N. Y. 33. The jurisdiction of the territorial court not having been avoided and that court having the actual custody of the *res*, it had the power to preserve the subject matter of the controversy that necessarily is incident to such conditions."

It was said in *Mueller* v. *Nugent*, 184 U. S. 1, at page 14, "It is as true of the present law as it was of that of 1867, that the filing of the petition is a *caveat* to all the world, and in effect an attachment and injunction, *Bank* v. *Sherman*, 101 U. S. 403; and on adjudication, title to the bankrupt's property became vested in the trustee, §§ 70, 21*e*, with actual or constructive possession, and placed in the custody of the bankruptcy court." That statement of the general rule has been recognized as subject to some limitations. *Acme Harvester Co.* v. *Beekman Lumber Co.* 222 U. S. 300, 306. *Frank* v. *Vollkommer*, 205 U. S. 521, 529. *Hiscock* v. *Varick Bank*

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of New York, 206 U. S. 28, 41. *Kelley* v. *Gill*, 245 U. S. 116, 120, 121. It has been held that that statement "was made in regard to the particular facts in that case." *York Manuf. Co.* v. *Cassell*, 201 U. S. 344 at page 353, and hence "not as applicable to all intents and purposes." *Jones* v. *Springer*, 226 U. S. 148, 155. It seems from those decisions that *Mueller* v. *Nugent*, 184 U. S. 1, does not operate to divest the Superior Court of jurisdiction under the circumstances here disclosed.

On the other hand, it is plain that upon the adjudication of bankruptcy and the appointment and qualification of a trustee, it became the duty of the Superior Court upon proper proceedings and in an orderly manner to see that the property of the bankrupt in the hands of its officers was transferred to the trustee appointed by the Federal court. But as was said by Mr. Justice Miller, in *Eyster* v. *Gaff*, 91 U. S. 521, 524, 525, "It is a mistake to suppose that the bankrupt law avoids of its own force all judicial proceedings in the State or other courts the instant one of the parties is adjudged a bankrupt. There is nothing in the act which sanctions such a proposition. The court in the case before us had acquired jurisdiction of the parties and of the subject matter of the suit. It was competent to administer full justice, and was proceeding, according to the law which governed such a suit, to do so. It could not take judicial notice of the proceedings in bankruptcy in another court, however seriously they might have affected the rights of parties to the suit already pending. It was the duty of that court to proceed to a decree as between the parties before it, until by some proper pleadings in the case it was informed of the changed relations of any of those parties to the subject matter of the suit. Having such jurisdiction, and performing its duty as the case stood in that court, we are at a loss to see how its decree can be treated as void." This statement, although used in a slightly different connection, appears peculiarly applicable to the case at bar. The Superior Court had jurisdiction of the *res*, and was proceeding in the exercise of that jurisdiction. That jurisdiction was recognized by the trustee in bankruptcy. Without any proper pleadings the receiver turned over to the trustee within a few days after the adjudication all the assets of the bankrupt in his hands, excepting only cash, the bills receivable due to the receiver, and such other assets as by agreement between the trustee and the

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receiver could be more advantageously handled and turned into cash by the latter. A decree of the Superior Court recognizing and confirming this arrangement was entered about six months after it had been made in fact. This decree was assented to in terms by the trustee. Another decree of the Superior Court reciting these facts as a reason for reducing the bond of the receiver also was assented to by the trustee. Under these conditions it would be harsh and inequitable to say that the Superior Court had no jurisdiction except of its own motion and without any petition to order turned over to the trustee all property in the hands of its receiver and remand the latter to the bankruptcy court for the adjustment of all his acts performed under the direction of the Superior Court.

The weight of authority appears to support the view that it is within the power of the State court under such circumstances as are here presented to determine the fees of its receiver and his necessary expenses. It has been so adjudged expressly in *Kennedy* v. *American Tanning Co.* 1 Buch. 109, *Singer* v. *National Bedstead Manuf. Co.* 20 Dick. 290, *Mauran* v. *Crown Carpet Lining Co.* 23 R. I. 344, *Wilson* v. *Parr*, 115 Ga. 629, 634, *Loveless* v. *Southern Grocer Co. Ltd.* 86 C. C. A. 395; 159 Fed. Rep. 415, *First National Bank of Quincy* v. *Zangwill*, 61 Fla. 596, 597, *McGahee* v. *Cruickshank*, 133 Ga. 649, 651, *Hanson* v. *Stephens*, 116 Ga. 722, 726. See *State* v. *German Exchange Bank*, 114 Wis. 436, and *Hume* v. *Myers*, 155 C. C. A. 415, 418; 242 Fed. Rep. 827, 830. The case of *Bank of Andrews* v. *Gudger*, 128 C. C. A. 245; 212 Fed. Rep. 49, relied on by the trustee, is quite distinguishable, for there the receiver acting under instructions of the State court refused to turn over the property to the trustee in bankruptcy. *Graham Manuf. Co.* v. *Davy-Pocahontas Coal Co.* 151 C. C. A. 424; 238 Fed. Rep. 488, in the point decided does not go beyond this. The case of *In re Neuburger, Inc.* 153 C. C. A. 633; 240 Fed. Rep. 947, related to a voluntary assignment of such nature as itself to constitute an act of bankruptcy, and the assignee accounted to the State court but does not appear to have owed his appointment to the State court. In *In re Sage*, 149 C. C. A. 640, 649; 236 Fed. Rep. 644, 653, the appointment of the receiver was made by the State court after the adjudication of bankruptcy. In *Randolph* v. *Scruggs*, 190 U. S. 533, the property of the bankrupt was in the hands of

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a voluntary assignee and not of a receiver appointed by a court of competent jurisdiction. That case was similar to *White* v. *Hill*, 148 Mass. 396, and *Clark* v. *Sawyer*, 151 Mass. 64.

The trustee relies upon statements in some decisions by district judges that the compensation of a receiver appointed by a State court must be determined by the bankruptcy court. *In re Rogers*, 116 Fed. Rep. 435. *In re Rogers & Stefani*, 156 Fed. Rep. 267. *In re Standard Fuller's Earth Co.* 186 Fed. Rep. 578. *In re Weedman Store Co.* 199 Fed. Rep. 948. *In re Williams*, 240 Fed. Rep. 788. To the same effect is *Whitla & Nelson* v. *Boyd*, 130 C. C. A. 167; 213 Fed. Rep. 587. Without pausing to examine these cases in detail, we are of opinion that, if they are applicable to such circumstances as are here disclosed, they ought not to be followed.

If the question is considered apart from authority, it seems to us that the same conclusion must be reached. The Federal and State courts, in a sense established by different sovereignties, exercise a concurrent territorial jurisdiction. It is of great importance that conflict of jurisdiction between these courts be avoided so far as possible. When the property of the corporation was taken by the receiver, it passed into the custody of the law. Its administration was wholly under the direction of a court of competent jurisdiction. The property in the case at bar being an established manufacturing business, it well might be necessary for its preservation that it be continued in operation and thus considerable expenses incurred and revenues collected. Between the date of the filing of the petition in bankruptcy and the adjudication and appointment of a bankruptcy receiver or trustee, it was necessary that the receiver of the Superior Court should continue his custody of the property and management of the business. He could only do this under the direction of the Superior Court. His conduct upon all matters of consequence in the administration of the estate of the corporation must be under the immediate supervision of the Superior Court and must be authorized by its decrees. A receiver is sometimes appropriately termed the arm of the court. The difficulties which a receiver encounters, the magnitude of his task, the degree of skill required and the value of the business sagacity actually exercised, must be better known to the court appointing and supervising him than to any other court examining the subject after the events.

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It would seem that the jurisdiction which rightly makes the appointment of a receiver ought to determine all the questions as to his accounting and his final discharge. The Superior Court manifestly would have been bound immediately after the fact of bankruptcy had been called to its attention by appropriate pleading to order the transfer of the property of the bankrupt to the trustee, reserving only enough to pay expenses of its receiver. In fact the receiver without formal proceedings turned the assets in his hands over to the trustee directly after his appointment except such property as could be more profitably handled by himself. This was later authorized by decree. The trustee in bankruptcy did not become a party to any proceeding in the Superior Court until after the final decree was entered and all property except the amount required for the receiver's expenses had been ordered turned over to him.

Some degree of comity would seem to be due between courts exercising the kind of jurisdiction distributed under our dual system of government between the several States and the central national power. Failure to recognize the power of the court, acting within its jurisdiction in appointing a subordinate officer and directing him to perform valuable service respecting property in the custody of the court, to fix his compensation and see that he receives the sum so decreed out of money in its hands, is inconsistent with any degree of comity. It hardly appears to accord to a court exercising a concurrent jurisdiction the respect due to its character, to hold its officer, acting strictly within his duty and under its jurisdictional direction in the preservation and management of property, responsible and accountable also to another court as to the same matters. It seems to us that such a meaning ought not to be attributed to an act of Congress without words indicating that intent beyond all doubt. We fail to discover any such purpose governing the case at bar.

The contention is made by the trustee that the fees allowed to the receiver were too large. While there seems to be some force in this suggestion, the charges cannot be pronounced excessive in the absence of any evidence. It may be that the services rendered were of unusual character or of peculiar value. But the evidence is not reported. In the absence of a report of evidence under the

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familiar rule, the finding of the Superior Court upon that question of fact cannot be set aside.

The same rule must govern as to the fees allowed to counsel. Apparently in one of the bills of attorneys consideration was given to services rendered in bringing the original bill in equity upon which the receiver was appointed. The amount apportioned to this element is not disclosed. Jurisdiction to make allowances of this kind in proceedings, such as this was, for the common benefit of many persons interested in the preservation of property, has been recognized and exercised in numerous cases. *Davis* v. *Bay State League*, 158 Mass. 434; and cases collected. *Carlson* v. *Revere Beach County Fair & Musical Railway*, 227 Mass. 291. *Harrison* v. *Perea*, 168 U. S. 311, 325. This principle seems to be recognized in *Randolph* v. *Scruggs*, 190 U. S. 533, 538, 539.

Order denying trustee's petition for order to receiver affirmed. Final decree affirmed.

FREDERICK E. SIMMONS *vs.* COUNTY OF SUFFOLK.

Suffolk. February 4, 1918. — May 24, 1918.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Clerk of Courts. Police, District and Municipal Courts. Statute.

By the increase, effected by St. 1917, c. 340, § 1, upon its acceptance by the mayor and city council of Boston, in the salaries of the clerks of police, district and municipal courts, with certain exceptions, to three fourths of the salaries received by the justices of their respective courts from three fifths thereof, as previously provided by St. 1904, c. 453, § 1, the salaries of the assistant clerks, which by the same section of St. 1904, c. 453, had been made two thirds of the salaries of the clerks, were increased to two thirds of the increased salaries of the respective clerks.

CONTRACT for a balance alleged to be due to the plaintiff by reason of an increase of his salary as assistant clerk of the Municipal Court of the Dorchester District caused by the acceptance of the provisions of St. 1917, c. 340, by the mayor and city council of Boston. Writ dated September 12, 1917.

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The action was heard by *Aiken*, C. J., upon an agreed statement of facts. The Chief Justice found for the plaintiff in the sum of $75.84 and reported the case for determination by this court.

The case was submitted on briefs at the sitting of the court in February, 1918, and afterwards was submitted on briefs to all the justices.

J. P. Lyons, for the defendant.

F. Juggins & C. A. De Courcey, for the plaintiff.

PIERCE, J. The plaintiff is now, and has been from a time before June 12, 1917, a duly appointed assistant clerk of the Municipal Court of the Dorchester District, and as such clerk has held the office and performed the duties of an assistant clerk of that court. Clerks and assistant clerks of police, district and municipal courts, other than the Municipal Court of the City of Boston, since St. 1904, c. 453, as amended by St. 1910, c. 501, have received salaries which under the statute of 1904 were determined by a percentage of the salary of the justice of their several courts, "the salaries of the clerks being in amount three fifths of the salaries of the justices, and the salaries of the assistant clerks two thirds of the salaries of the clerks." By the acceptance of St. 1917, c. 340, by the city council and the mayor of the city of Boston, on June 12, 1917, the salary of the clerk of the court of which the plaintiff is the assistant clerk was increased from three fifths to three fourths of the salary received by the justice of that court. It is the contention of the plaintiff that the salary of the assistant clerk was by the acceptance of the act automatically increased from two thirds of three fifths to two thirds of three fourths of the salary received by the justice of that court. On the other hand, the defendant argues that the salaries of the assistant clerks are not affected by the acceptance of St. 1917, c. 340, because "No mention is made, in the act just quoted, of assistant clerks," and because the salaries of the clerks were fixed and defined in numerical terms under the class to which the respective courts were assigned.

We are of opinion the contention of the plaintiff is correct. The maxim of statutory construction that the expression of one thing is the exclusion of another, invoked by the defendant, is not conclusive of legislative intent, but is to be considered with regard to the object sought to be obtained by the entire legislation of which the subject matter to which it relates is but a part. The obvious

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intention of the Legislature in dividing the judicial districts into classes according to the population in the several districts, was to attain a fair and just standard of comparison of the services required to be rendered in the several districts, and therefrom to enable it to grant to the several justices and clerks with reasonable approximation like compensation for like services. Under the plan the salary of any justice or clerk or assistant clerk is determined by the class to which the particular judicial district was assigned, and continues until readjusted by a change in the classification of the district after the taking of a national or State census. St. 1910, c. 501. A change in the classification to a higher grade results automatically in the increase of salary of any official, and by the express provision of the statute does not reduce the salary theretofore received by any official while such official continues to hold office.

We are of opinion the dominant purpose of the Legislature was to find a fair ratio or relation which the services of the several officials should bear to the work of the judicial district and to each other. It follows that an increase in the salary of any official, however obtained, results in a change in the salary of every official whose salary is determined by its relation to the salary changed.

In the opinion of a majority of the court the ruling of the justice of the Superior Court was right. In accordance with the terms of the report judgment is to be entered for the plaintiff in the sum of $75.84.

So ordered.

FRANCIS H. KENDALL & others, trustees, *vs.* FIDELITY TRUST COMPANY.

Suffolk. March 4, 1918. — May 24, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, & CARROLL, JJ.

Equity Pleading and Practice, Parties. *Bank. Equity Jurisdiction*, To impress fund with trust.

In a suit in equity brought by the trustees of a land trust against a bank to impress with a trust funds of the plaintiffs deposited with the defendant by a dishonest employee of the plaintiffs in his own name and afterwards wholly withdrawn and

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misappropriated by him, the dishonest employee has no interest in the subject matter of the suit and is not a necessary party.

Where a bank has had no actual or constructive notice of fraud or misdoing on the part of a treasurer, who is one of its depositors, if the bank acting in good faith merely credits deposits of checks, which it knows to have been drawn by the treasurer upon the funds of the principal, to the personal account of the treasurer, this does not make it liable to the principal if the treasurer afterwards misappropriates the deposit.

Where the trustees of a land trust gave to a person employed by them as assistant treasurer authority in writing to draw checks on the funds of the trust in a certain bank and he by a series of checks on this bank, signed in the name of the land trust by him as assistant treasurer, drew out a large sum of money, depositing each of the checks in an account in his own name in a trust company, in which he already had a deposit of other money, and afterwards drew out all the money thus deposited and absconded with it, and where the account containing these deposits never had been overdrawn, in a suit in equity brought by the trustees against the trust company, seeking to impress with a trust the funds thus deposited with the defendant by the plaintiffs' dishonest agent, it was *held* that, as the defendant had no interest in the deposits and never had received any part of them for the payment of any debt to it, the defendant could not be charged with constructive notice of the fraudulent conduct of the depositor, and accordingly that there was no evidence that the defendant knew that the depositor intended to misappropriate the funds, and that the plaintiffs were entitled to no relief against it.

BILL IN EQUITY, filed in the Supreme Judicial Court on March 26, 1917, by the trustees under a declaration of trust dated December 12, 1911, doing business, under the name School Street Associates, in holding, improving and managing certain real estate in Belmont, against the Fidelity Trust Company, a corporation, seeking to impose a trust for the benefit of the plaintiffs on certain funds deposited with the defendant by one Mariano Alvero in checks drawn by him upon money of the plaintiffs in the Merchants National Bank of Boston which were signed "School Street Associates, By M. Alvero, Assistant Treasurer."

The case came on to be heard by *De Courcy*, J., who overruled so much of the defendant's answer as was by way of demurrer and, at the request of the parties, reported the case upon the bill and answer and an agreed statement of facts for determination by this court, such decree to be entered as equity and justice might require.

The material facts are stated in the opinion. The first of the checks deposited with the defendant was dated September 5, 1916. It was for $300 and was made payable to Alvero. All the other checks were made payable to the Fidelity Trust Company and their dates and amounts were as follows: September 5, 1916, $700,

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September 8, 1916, $500, September 8, 1916, $500, September 16, 1916, $500, October 4, 1916, $500, October 10, 1916, $500, October 26, 1916, $500, November 3, 1916, $500, November 10, 1916, $200, November 14, 1916, $200, November 17, 1916, $100.

G. K. Gardner, for the plaintiffs.

J. E. McConnell, (*J. E. Eaton & E. T. McKnight* with him,) for the defendant.

CROSBY, J. This is a bill in equity by which the plaintiffs, as the trustees of the School Street Associates, seek to impress with a trust certain money deposited in the defendant's bank by one Alvero, assistant treasurer in the employ of the plaintiffs, the amount so deposited being afterwards wrongfully withdrawn and misappropriated by him. A single justice overruled so much of the answer as is by way of demurrer, and at the request of the parties reported the case to this court upon the bill and answer and an agreed statement of facts.

Where a suit in equity has for its object the disposal of a trust fund, all known claimants of the fund must be made parties. In the case at bar the defaulting employee, Alvero, although he was the depositor of the funds in the defendant's bank has no interest whatever in the subject matter of the suit and need not be joined as a party. The cases of *Gregory* v. *Merchants' National Bank*, 171 Mass. 67, and *Carr* v. *National Security Bank*, 107 Mass. 45, cited by the defendant, are not applicable to the facts in the present case.

It is recited in the agreed statement of facts that the plaintiffs kept the money of the trust in a deposit account with the Merchants National Bank of Boston; that in January, 1913, Alvero was employed by the plaintiffs, and by an instrument in writing was authorized "to sign checks upon Merchants National Bank of Boston, and endorse checks for deposit in said Bank, from January 11, 1913, until further notice." This instrument was filed with the Merchants National Bank and was not revoked until all the deposits made by Alvero had been withdrawn from the Fidelity Trust Company. Between September 5 and November 18, 1916, Alvero drew a series of checks on the Merchants National Bank signed "School Street Associates, by M. Alvero, Assistant Treasurer," and deposited them with the defendant for collection. The first of these checks, dated September 5, 1916, for $300, was made

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payable to Alvero individually; the other checks were all payable to the defendant and amounted to $4,700.

It is agreed that "Each of these checks was deposited with the defendant for collection by Mariano Alvero on the day of its date, was duly presented to the Merchants National Bank through the clearing house, and was paid. The proceeds by Alvero's direction were placed to the credit of Alvero's personal account with the defendant. In this personal account Alvero also deposited money other than that derived from proceeds of checks drawn upon the plaintiffs' account. This personal account with the defendant was at no time overdrawn and the defendant never received any part of that account for its own use or in payment of any debt to it, but paid out the whole from time to time upon the personal checks of Alvero. None of the checks upon the plaintiffs' account above referred to were drawn by Alvero for the use or purposes of the plaintiffs, but all were drawn for his individual purposes. The defendant's only knowledge of Alvero's authority to draw checks against the account of the plaintiffs was from the checks themselves and the fact that the same were honored by the Merchants National Bank. The defendant had no notice of any fraudulent purpose on the part of Alvero in drawing the checks above referred to and in the disposition of the proceeds unless it is chargeable with notice by reason of the form of the checks and that their proceeds were credited to Alvero's personal account. On November 18, 1916, Alvero absconded, having drawn out and expended for his own purposes the entire balance of his personal account with the Fidelity Trust Company."

We are of opinion that the form of the checks and the fact that their proceeds were credited to Alvero's individual account are not sufficient to warrant a finding that the defendant had reason to believe that Alvero was acting dishonestly. There is nothing to show that the defendant in collecting the checks drawn upon and paid by the Merchants National Bank without objection had any reason to suspect that the depositor was committing a fraud; or that the checks were not presented by the defendant in good faith to the bank on which they were drawn. As the defendant had no interest in the deposits and never received any part thereof for the payment of any debt due it, but credited all amounts so collected to Alvero's personal account, it cannot be charged with constructive

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notice of the fraudulent conduct of the fiduciary. R. L. c. 73, §§ 69, 72, 73. *Pratt* v. *Higginson, post,* 256. *Newburyport* v. *First National Bank of Boston,* 216 Mass. 304. *Allen* v. *Puritan Trust Co.* 211 Mass. 409, 422, 423. *Newburyport* v. *Spear,* 204 Mass. 146. *Fillebrown* v. *Hayward,* 190 Mass. 472. *Batchelder* v. *Central National Bank of Boston,* 188 Mass. 25. *Havana Central Railroad* v. *Knickerbocker Trust Co.* 198 N. Y. 422. *Goodwin* v. *American National Bank,* 48 Conn. 550. *Mott Iron Works* v. *Metropolitan Bank,* 78 Wash. 294. *Gray* v. *Johnston,* L. R. 3 H. L. 1.

The weight of authority is in accord with the view that if a bank, acting in good faith, merely credits trust funds, knowing them to be such, to the personal account of the fiduciary, it will not be liable if he later misappropriates such funds. Cases cited in note to *Allen* v. *Puritan Trust Co.* L. R. A. 1915 C 518. As the defendant cannot be charged with constructive notice of the fraudulent acts of Alvero merely because of the form of the checks and because the amounts collected thereon were deposited in his personal account with other funds deposited by him, it follows that there is no evidence that the defendant knew he intended to misappropriate the funds and the defendant therefore cannot be held liable.

Upon the report a decree should be entered dismissing the bill with costs.

So ordered.

THOMAS S. WILSON *vs.* FREDERICK C. ALEXANDER.

Suffolk. March 4, 1918. — May 24, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Negligence, Employer's liability.

In an action by a carpenter against his employer for personal injuries sustained before the workmen's compensation act took effect, it appeared that the plaintiff was injured when he was at work piling sawed hard pine lumber by means of an engine, a derrick and a pair of tongs and that one of the timbers slipped from the tongs and struck the plaintiff on the head. There was evidence that the tongs were unsuitable for hoisting such timbers, being intended for use only in handling round logs and that the only safe tongs for such timbers were chain tongs, which easily could be had in the open market. The jury found, in answer

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to special questions, that the tongs supplied by the defendant were in common use for the purpose for which the defendant used them and were used commonly by contractors and builders for such work. The jury returned a general verdict for the plaintiff, but the judge ruled that on the special findings the action could not be maintained. *Held*, that the ruling was wrong; because, if the tongs were unsuitable and unsafe and the defendant in the exercise of reasonable diligence should have known this, it was no defence for him that he had proceeded in the usual manner pursued by other builders under like circumstances.

TORT by a carpenter for personal injuries sustained on September 8, 1911, while in the employ of the defendant, who was constructing a large building at No. 28 Medway Street in the part of Boston called South Boston, by being struck on the head by a sawed hard pine timber which slipped from the tongs by which it was being hoisted. Writ dated January 15, 1912.

In the Superior Court the case was tried before *J. F. Brown*, J. The evidence is described in the opinion. The special questions submitted to the jury, there referred to, were as follows:

"1. Were tongs of the kind supplied by the defendant in common use by builders and contractors for the purpose for which the plaintiff was using them?

"2. Were the tongs sold to the defendant as an appliance commonly used by contractors and builders for the purpose for which the plaintiff was using them?"

To each of these questions the jury answered, "Yes." The jury returned a verdict for the plaintiff in the sum of $1,500, and thereupon the judge, subject to the plaintiff's exception, set aside the verdict and, upon the answers to the questions submitted to the jury, ordered a verdict for the defendant and by agreement of the parties reported the case for determination by this court. If the rulings of the judge were right, the verdict for the defendant was to stand; otherwise, a verdict was to be entered for the plaintiff in the sum of $1,500.

J. W. McAnarney & T. F. McAnarney, for the plaintiff.

E. C. Stone, for the defendant.

BRALEY, J. It is not contended that as matter of law the plaintiff was careless or assumed the risk, and the only question is whether there was any evidence of the defendant's negligence. The jury were warranted in finding that while the plaintiff was at work piling "sawed hard pine timber" of different lengths by means of a steam engine, a derrick and a pair of tongs which were

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placed on either side of the timber, one of the timbers slipped from the tongs and fell, striking him on the head and causing the injuries for which damages are sought.

It also was uncontradicted that, when in operation, the tongs did not sink into or "bite" the timber, but worked "like a clamp." An expert called by the plaintiff testified not only that the tongs were unsuitable for hoisting such timbers because made and intended for use in handling round logs, and that the only safe tongs were chain tongs which "could easily be had in the open market." If this evidence was believed, the duty of the defendant to provide reasonably safe tools or appliances with which the plaintiff was to perform his work had not been discharged.

But, the defendant having introduced evidence from which the jury in answer to special questions found that the tongs supplied were in common use for the purpose for which the defendant furnished them and were commonly used by contractors and builders in such work, the presiding judge, notwithstanding a general verdict for the plaintiff, ruled that the action could not be maintained.

The ruling was wrong. The defendant undoubtedly was not required to provide for the use of his employees the latest or safest appliances, even if in the opinion of competent mechanical experts such appliances would have been more suitable or less dangerous. *Sullivan* v. *India Manuf. Co.* 113 Mass. 396. *Wolfe* v. *New Bedford Cordage Co.* 189 Mass. 591. But the jury on conflicting evidence were to say whether the tongs were made for or properly adapted to the use to which they were put, and this essential element is lacking in the questions submitted. The facts, that other employers furnished similar appliances for use in similar work and that the tongs were purchased from a reputable maker do not as matter of law relieve the defendant, if the appliance furnished, although perfect in mechanism, is found to be unsuitable and unsafe, which condition the defendant knew or in the exercise of reasonable diligence should have known. *Myers* v. *Hudson Iron Co.* 150 Mass. 125, 138. *Geloneck* v. *Dean Steam Pump Co.* 165 Mass. 202, 217. *Slattery* v. *Walker & Pratt Manuf. Co.* 179 Mass. 307, 312. See also *Feeney* v. *York Manuf. Co.* 189 Mass. 336. As said by Colt, J., in *Hill* v. *Winsor*, 118 Mass. 251, 259, "there is no rule of law which exempts one from the consequences of his negligent conduct upon proof that he proceeded in the usual man-

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ner and took the usual course pursued by parties similarly situated, although he was without notice that he could not safely do so."

By the terms of the report the plaintiff is to have judgment for the amount stipulated.

So ordered.

FRANCIS T. MULLANEY & others *vs.* MARY F. MONAHAN, BRIDGET TOBIN & another, intervening petitioners.

Suffolk. March 6, 1918. — May 24, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Devise and Legacy, Identity of residuary legatee.

Where the will of a testator, whose only sister of the whole blood had died before him and who left surviving him four brothers of the whole blood and six brothers and two sisters of the half blood, provided that his residuary estate, after the death of his wife, should be given "in equal shares to my several brothers and my sister, to the exclusion of my brother Patrick Mullaney, [a brother of the whole blood,] and to the children of any of said brothers or sister who may have deceased, by right of representation, to the exclusion of said Patrick as heir of my said estate from or through any of my other brethren or sister or their children," and where it does not appear whether the sister of the whole blood died before or after the will was made, the testator's use of the word "sister" shows his intention to confine his gift to his kindred of the whole blood.

BILL IN EQUITY, filed in the Superior Court on June 5, 1917, by three children of a brother of the half blood of Thomas Mullaney, late of Boston, testate, seeking an accounting as to rents from real estate formerly owned by the testator and a construction of his will for the purpose of determining who were entitled to such rents.

By decrees upon sundry petitions, two children and a widow of a brother of the whole blood, two grandchildren of the testator's only sister of the whole blood, and a sister of the half blood were admitted as parties plaintiff.

The children and widow of the brother of the whole blood then moved that the kindred of the half blood be stricken out as parties plaintiff; and a second sister of the half blood petitioned for admission as a party plaintiff.

The case was heard upon these interlocutory matters by *Wait*, J.

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The report states, "Whether or not she [Mary Healey, the testator's only sister of the whole blood] was living at the time the will was made does not appear." Other material facts are stated in the opinion. By order of the judge, an interlocutory decree was entered in substance permitting half brothers of the testate and their issue to remain as parties plaintiff and excluding as such both half sisters. The judge reported the case for determination by this court.

The case was submitted on briefs.

J. F. Ryan & C. M. O'Leary, for the plaintiffs.

F. Nesmith, J. S. Stone & A. G. Grant, for the intervening petitioners.

F. G. Cook, for the children of Edward Mullaney.

BRALEY, J. The testator by the fifth clause of his will after creating an estate for life in favor of his wife, devised the remainder as follows, "and at her death I give the same in equal shares to my several brothers and my sister, to the exclusion of my brother Patrick Mullaney, and to the children of any of said brothers or sister who may have deceased, by right of representation, to the exclusion of said Patrick as heir of my said estate from or through any of my other brethren or sister or their children; to have and to hold the same after the death of my Wife in fee simple as aforesaid." There were living at his death four brothers and the children of one sister who had deceased, kindred of the whole blood, and six brothers and two sisters, kindred of the half blood, all of whom under the statutes then in force would have participated in the distribution of his estate if he had died intestate. Gen. Sts. c. 91, §§ 1, 5; c. 95, § 16. St. 1876, c. 220.

The question raised by the parties, is, whether the brothers and sisters of the half blood are entitled to share in the property.

It was long ago said in *Hayden* v. *Stoughton*, 5 Pick. 528, 536, that the first object in the construction of wills is to effect the intention of the testator unless by so doing some rule of law is violated, and an "heir at law is not to be disinherited unless such appears clearly to be the intention of the devisor." If however the testator has clearly expressed such purpose, or it appears by unavoidable implication, his intention must control.

While it is to be presumed the testator knew the law and made his will in view of existing statutes, *Dana* v. *Dana*, 185 Mass. 156,

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158, his use of the word "sister," read in connection with the words "to the children of any of said brothers or sister who may have deceased," which cannot be enlarged, plainly refers to his sister of the whole blood, as sisters of the half blood are not included. *Metcalf* v. *Framingham Parish*, 128 Mass. 370. *Child* v. *Child*, 185 Mass. 376. But, if the testator's intention to disinherit his half sisters must be given full effect, the phraseology relating to his "brothers" or "brethren" is apt and sufficient to embrace all the testator's brothers of every degree. If this construction is adopted the children of the sister and the brothers with the exception of Patrick would share equally as legatees and devisees. The difficulty however in adopting this construction is, that no satisfactory reason can be found even when the will is read in the light of such extrinsic facts as the record discloses, why the testator if he had in mind equality of distribution should have limited his bounty to one sister, and at the same time purposed to include his half brothers.

While the question is not free from difficulty, we are of opinion that only those of the whole blood are to take the estate. By this construction an arbitrary discrimination between children of the half blood when considered as a class is avoided, and the testator's selection of his sister is given full effect as a revelation of his purpose as to her brothers, and that when he made the will he had in mind only the family of which not only herself but her brothers as well as himself were of the same degree of kinship.

It follows that so much of the decree as denied the motion to strike out as parties plaintiff Francis T. Mullaney, Joseph F. Mullaney and Mary J. Mullaney, children of Joseph Mullaney, a deceased half brother of the testator, must be reversed, but in all other respects it is affirmed.

Ordered accordingly.

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FRED S. ELWELL *vs.* STATE MUTUAL LIFE ASSURANCE COMPANY.

SAME *vs.* WILLIAM G. WILLIAMS.

Suffolk. March 7, 8, 1918. — May 24, 1918.

Present: BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Contract, What constitutes, Construction, Consideration, Performance and breach, Termination, Of agency. *Frauds, Statute of*. *Agency*, Agent's compensation. *Insurance*, Agency.

An insurance solicitor made a contract in writing with a firm composed of two partners, who were the general agents of a life insurance company, by which he agreed to act as a solicitor for that company only and which provided as his compensation during the general agency of the firm a certain percentage of premiums on new business procured by him and a different percentage on all renewal premiums, and also provided that the contract should be terminated as between the parties only in certain specified instances. One of the firm retired as a partner. The remaining partner then alone made a new contract of general agency with the company, but, instead of making a new contract in writing with the solicitor, agreed with him orally that the provisions of the contract formerly made with him by the firm should continue in force. *Held*, that the new oral contract was supported by a good consideration and was not terminable at the will of the general agent, but could be terminated only in accordance with the provisions of the former contract in writing which it adopted.

A provision of the contract thus adopted by the oral contract, which provided for its termination if the solicitor left the agency of the company to engage in other business or became connected with another life insurance company or severed his connections with the agency, was *held* to mean that such termination should occur upon a voluntary retirement by the solicitor, and not to mean that it would occur upon his discharge for a cause not included in the contract's provisions or upon his enforced resignation.

Where such a contract, made by the company's general agent, was a complete contract for services to be rendered by the solicitor, the compensation for which was to be paid by the company, the company was *held* to have no power to terminate it in the absence of a provision in the contract for such termination by the company.

The mere fact, that the solicitor above described advocated and sought legislation providing for a different form of endowment policy than that issued by the company, does not show disloyalty on his part warranting his discharge, where it appears that he honestly believed that the form of policy which he advocated, if adopted, would enure to the advantage not only of the insured but also of the company, and that his activities in this regard were known to the company.

Where, at the trial of an action upon the contract above described by the solicitor against the company, it appeared that the company and the general agent both

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regarded the contract as binding upon the company, that its officers knew of the contract, that it paid the solicitor his commissions thereunder and that the company was the actor in discharging the solicitor and fixing the terms of his dismissal, findings of the judge were *held* to have been warranted that the company was liable upon the contract for the continued payment to the solicitor of renewal premiums according to the contract's provisions.

In an action upon the same contract against the general agent it was *held* that the general agent likewise was liable personally to the solicitor, although the solicitor could have but one satisfaction in damages.

An oral contract between a solicitor of insurance and a life insurance company or its general agent, which is to continue in force during the continuation of the general agency or until it is terminated by reason of one of several specified acts on the part of the solicitor, and which provides for the payment to the solicitor as compensation of a certain percentage of first year's premiums and another percentage of all renewal premiums upon policies procured by him from the company, is not within the provisions of the statute of frauds, R. L. c. 74, § 1, cl. 5, enacting that "No action shall be brought . . . Upon an agreement that is not to be performed within one year from the making thereof" unless the agreement or some memorandum thereof is in writing, as the contract, although it may continue in force for years, is capable of being performed fully within a year.

TWO ACTIONS OF CONTRACT by a life insurance solicitor, the second action being against a general agent of the defendant in the first action, upon an alleged contract with the plaintiff as a subordinate agent. Writs dated December 28, 1914, and July 7, 1916, respectively.

The actions were referred to an auditor and afterwards were heard together by *Fox*, J., upon the auditor's report and under the agreement described in the opinion. The material findings of the auditor also are described in the opinion.

The judge found for the plaintiff in the first action in the sum of $647.48 and interest from the date of the writ, and in the second action in the sum of $2,884.16 and interest from the date of the writ, and reported the actions to this court for determination.

H. Parker, for the defendants.

E. F. McClennen, for the plaintiff.

BRALEY, J. By stipulation of the parties the auditor's findings of fact have been accepted as final "except as it appears from the record itself that such findings are not supported by competent evidence." But as the auditor's rulings upon evidence do not appear to have been erroneous, we come to the merits of the controversy.

The plaintiff having moved for judgment on the report, in which all questions at issue have been decided in his favor, the defendants

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severally asked the presiding judge to rule as "matter of law that the plaintiff's motion for judgment in accordance with the auditor's report must be denied," and that "upon the evidence reported by the auditor and upon the findings of fact made by the auditor in his report, the defendant is entitled to judgment." The requests were denied, and the judge, having found and ordered judgment for the plaintiff, reported the cases for the determination of this court, which is to order "judgment to be entered for the plaintiff in accordance with the foregoing order if the same be found to be warranted in law; otherwise such judgment or order to be entered . . . as law and justice may require."

The plaintiff as a subordinate agent solicited life insurance for the defendant company under two contracts in writing, the first of which need not be reviewed, but the terms of the second become important in view of the auditor's findings. It was made between the plaintiff and Williams and Jones, the defendant company's general agents, and among other provisions established the plaintiff's compensation for services on a percentage basis "for first year of insurance," and also on all renewals. But, Jones having resigned on July 1, 1901, the defendant Williams succeeded as the company's general agent, and continued as such to the date of the respective actions. The auditor reports that, after the retirement of Jones, while no written contract was entered into between the plaintiff and Williams, the plaintiff continued as before "to solicit insurance for the company down to July, 1909, when he was discharged by a letter of dismissal" signed by Williams as the company's general agent, and, after some correspondence and at least one interview between the plaintiff and the company, the company confirmed this action. It is stated in the letter of discharge "While you had no legal claim for commissions under this contract after the termination of the general agency of Williams and Jones, I have continued to allow you commissions since that time and shall allow you, in full settlement of all your claims under this contract, renewals for five full years from August 15, 1909, the date of termination, as provided for therein." And the auditor has found that the commission on all renewal premiums were duly paid until August 15, 1914, on all policies procured by the plaintiff. But, as no commissions have since been paid, these actions are brought to recover commissions alleged to have accrued thereafter.

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It is not contended by the plaintiff that the commissions were to be paid during the life of the respective policies but he relies upon an oral contract with the defendants. The auditor's findings, which are amply supported by the evidence recited, show that after Williams became the sole agent instead of "making out a new contract" in writing, "the provisions of the Williams and Jones agreement were to continue in force after the agency of Williams and Jones had ceased and were thus to define the relations between the plaintiff and the defendant, Williams, after that time." While it was said in the letter of dismissal that the plaintiff "had no legal claim for commissions under this contract after the termination of the general agency of Williams and Jones," the auditor says, "this statement is probably true if applied to the Williams and Jones contract alone without taking into consideration any new contract made by Williams with the plaintiff after the Williams and Jones agency ceased. . . . But it is plain that some such new contract was made thereafter and that under it Williams, as he said in his letter, "'continued to allow . . . commissions since that time' to the plaintiff." The question is one of fact, and the oral contract found by the auditor is to be deemed and treated as the same in terms and effect as if the Williams and Jones contract had been redrafted with the omission of the name of Jones. It is supported by a sufficient consideration, namely, services to be rendered by the plaintiff, and it was not terminable at the will of the defendant Williams or by the company which also can be held for reasons to be subsequently stated. *Rowe* v. *Peabody*, 207 Mass. 226, 234, and cases cited.

It could be ended only in accordance with its provisions. By article ten, if the plaintiff should "commit any misdemeanor" he forfeited any further commissions. The auditor reports that he has not been guilty of any misconduct at common law or under any statute which would constitute a misdemeanor. By article eleven the contract might be terminated if the plaintiff left the agency of the company to engage in other business, or became connected with another life insurance company, or severed his connection with the agency. This he has not done. If he had taken such action the plaintiff still was to have his renewal commissions for a period of five years after the termination of the agency. It is also settled, as the auditor rightly ruled, that the

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words, "In case the said agent leaves the agency," and "should said Elwell sever his connection with this company," mean the plaintiff's voluntary retirement and not his discharge, or an enforced resignation. *Gardner* v. *Metropolitan Life Ins. Co.* 225 Mass. 439. *Grapel* v. *Hodges*, 112 N. Y. 419.

Where the contract as in the present case is a complete contract for services to be rendered by the plaintiff, the compensation for which is to be paid by the principal, the principal alone cannot revoke unless a power of revocation is expressly reserved. *Dickinson* v. *Central National Bank*, 129 Mass. 279. See 31 Cyc. 1297, 1298, note 22, for a collection of cases. The consideration for the agency had not failed as in *Flynn* v. *Butler*, 189 Mass. 377. It also appears that the plaintiff advocated a different form of endowment policy than the policy issued by the company and sought legislation to that end. The defendants' contention that this conduct was sufficient to justify his discharge because it showed disloyalty to his principal, is disposed of by the auditor's finding, that the plaintiff was honest in his belief, that if the form he suggested were adopted it would enure to the advantage of not only the insured but of the company, and that in all which he did he acted in good faith, with the knowledge of the defendants.

It is sufficiently plain without further recitals from the report that the plaintiff never assumed, or was understood by the defendants to have assumed, such inconsistent relations with other parties as to prevent or influence his impartial and honest discharge of the duty he owed the defendants. *Quinn* v. *Burton*, 195 Mass. 277. It follows that under article five of the contract commissions on renewals would be ended only when the defendant Williams ceased to act as the company's general agent, and as the agency never has been terminated, the plaintiff can recover from him the commission of five per cent on all renewal premiums received since August 15, 1914, to the date of the writ, unless R. L. c. 74, § 1, cl. 5, to which reference will hereafter be made, is a bar.

But even if Williams entered into contractual relations with the plaintiff as previously described, the defendant company contends that the evidence fails to show any agreement by which it became bound. It was a question of fact, whether it was the intention and understanding of the parties that while the agent should be liable personally, the company also should be held. *Silver* v. *Jordan*,

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136 Mass. 319. The auditor's report warranted the judge in finding that both defendants regarded the contract as binding the company. Its officers knew of the contract. It paid the plaintiff his commissions thereunder, and it was the company itself which finally decided that he should be discharged, and fixed the terms of dismissal, as shown by the correspondence. The plaintiff, although entitled to but one satisfaction in damages, can accordingly sue the company's general agent who is personally responsible by the express terms of the contract, and the company also, which on the record had given authority to Williams to act in its behalf. *Byington* v. *Simpson*, 134 Mass. 169. *Brown* v. *Bradlee*, 156 Mass. 28, 32. *Crawford* v. *Moran*, 168 Mass. 446, 449. *Brown* v. *Franklin Mutual Fire Ins. Co.* 165 Mass. 565.

It lastly is urged by each defendant that having been oral the contract is within R. L. c. 74, § 1, cl. 5, declaring that no action shall be brought upon "an agreement that is not to be performed within one year from the making thereof" unless "the promise, contract or agreement . . . or some memorandum . . . thereof is in writing." The defendant Williams however might have died, or his general agency terminated within the year, or the insured might never pay a renewal premium, and the contract even if it might continue for years could be fully completed within one year. *Peters* v. *Westborough*, 19 Pick. 364. *Somerby* v *Buntin*, 118 Mass. 279, 286. *Scribner* v. *Flagg Manuf. Co.* 175 Mass. 536. *Carnig* v. *Carr*, 167 Mass. 544. The provision of § 1, cl. 2, that no action shall be brought to charge a person upon a special promise to answer for the debt, default or misdoings of another unless the promise, contract or agreement or some memorandum thereof is in writing signed by the party to be charged, also relied on by the defendants, is wholly inapplicable on the record.

The result is that, finding no error in the computation of the amounts or in any of the rulings of the auditor or of the court, judgment for the plaintiff is to be entered in each case.

So ordered.

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THOMAS F. JOYCE *vs.* CHARLES H. R. THOMPSON, administrator.

Essex. March 11, 1918. — May 24, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Error, Writ of. Supreme Judicial Court. Jurisdiction. Rules of Court. Practice, Civil, Service of process.

A voluntary appearance and a plea *in nullo est erratum* by the defendant in a writ of error, without any objection to the jurisdiction, nearly a year after the entry of the petition for the writ, confers jurisdiction of the subject matter and of the person of the defendant upon this court, although, after the writ was served upon the court to which it was directed and the record of the judgment sought to be reversed had been returned, no writ of scire facias to the defendant was issued.

A judgment in an action of contract is not subject to reversal upon a writ of error merely because the officer's return upon the writ states that, after making a nominal attachment, he left the summons "at his [the defendant's] last and usual place of abode," without adding the words "known to me to be such," the only reasonable interpretation of such a return being that the officer knew the facts to be as averred in his return, which showed a compliance with the requirements of R. L. c. 167, § 31.

WRIT OF ERROR, issued September 29, 1917, to the Chief Justice of the Superior Court upon the petition of the defendant in an action of contract begun on June 15, 1895, upon three promissory notes.

The assignments of error and the proceedings upon the writ are described in the opinion.

The case was submitted on briefs.

M. A. Cregg & H. A. Cregg, for the plaintiff in error.

S. H. Hollis, for the defendant.

BRALEY, J. By Common Law Rule 32 of the Supreme Judicial Court the plaintiff before taking out a writ of error is required to file the assignment of errors in the clerk's office, a copy of which shall be inserted in the scire facias to be served on the defendant, and to which he is to plead within ten days after the return day unless the court shall by special order restrict or enlarge the time. While the record fails to show that a writ of scire facias issued, and the defendant's plea was filed nearly a year after the entry of the petition, without any order of the court or consent of counsel for the plaintiff, the voluntary appearance by the defendant without objection is sufficient to confer jurisdiction.

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We find no assignment of error of fact, and the defendant by his plea *in nullo est erratum* admits that while the assignments of errors of law are true on the record, they are insufficient to reverse the judgment. *Perkins* v. *Bangs*, 206 Mass. 408. The question thus presented is one of law within the exclusive jurisdiction of the full court, and not of the court when held by a single justice. *Conto* v. *Silvia*, 170 Mass. 152.

The eight assignments are in legal intendment only different statements of the ground for reversal, that the service on the plaintiff of the writ in the original action was insufficient to give the trial court jurisdiction. The Pub. Sts. c. 161, § 31, in force when the service was made, provides, that "If the summons is not served personally on the defendant, the original or a copy, as the case may be, shall be left at his last and usual place of abode, if he has any within the Commonwealth known to the officer; and if he has none, it shall be left with his tenant, agent, or attorney, if he has any within the Commonwealth. . . ."

The form of the return is left to the officer serving process. The only requirement is, that to be valid it must show substantial compliance with the statute. The writ described the defendant as a resident of Lynn, and the officer's return states that after making a nominal attachment he left the summons "at his last and usual place of abode." If the words "known to me as such in said Lynn" had been added the present case would be governed by *Jones* v. *Walker*, 15 Gray, 353, where the judgment was affirmed. But these words are a mere amplification. The only reasonable construction is, that the officer knew the facts to be as averred, and, as the defendant's abode on the record was at the time in this Commonwealth, the return is to be read as unequivocally meaning the last and usual place of abode of the defendant in this Commonwealth known to the officer. And when so read it is sufficient to support the judgment. *Smith* v. *Randall*, 1 Allen, 456. *Graves* v. *Cushman*, 131 Mass. 359.

Judgment affirmed.

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HELEN W. PRATT *vs.* HENRY L. HIGGINSON & others.

Suffolk. March 13, 1918. — May 24, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, & PIERCE, JJ.

Bills and Notes, Negotiable bonds. *Stockbroker*. *Conversion*. *Words*, "Convertible."

A stockbroker, who in good faith and without any knowledge or notice of an infirmity in the title of his customer, sells for such customer a bond of the United States of America payable to bearer, deducts a customary commission therefor and the amount of a stamp which necessarily was affixed and pays the balance of the sale price to his customer, is not liable in an action of tort for conversion to the owner of the bond, from whom it has been stolen and given to the stockbroker's customer to be sold.

The same rule applies to a sale by the stockbroker under the same circumstances of a bond of the American Telephone and Telegraph Company, payable to a bank as trustee or to bearer and convertible at maturity at the owner's option into capital stock of the company, such a bond under R. L. c. 73, § 22, cl. 4, being a negotiable instrument.

TORT against a firm of bankers and stockbrokers for the alleged conversion of two bonds, described in the opinion, sold by the defendants for one Small who had received them from one Bassett, who had stolen them from the plaintiff. Writ dated January 12, 1916.

In the Superior Court, the action was submitted to *Hammond*, J., without a jury, upon a case stated, and was reported to this court for determination upon the pleadings and the case stated.

G. W. Abele, for the plaintiff.

A. A. Schaefer, for the defendants.

BRALEY, J. The plaintiff, the owner of a four per cent coupon bond of the United States of the par value of $1,000 payable to bearer, and of a four per cent convertible gold bond of the American Telephone and Telegraph Company of the par value of $1,000 payable to the Old Colony Trust Company, trustee, or to bearer, deposited the bonds in a safe deposit box from which they were purloined by one Bassett, who passed them over to one Small for the purpose of having them sold. The bonds were delivered by Small to the defendants, a firm of bankers and brokers, by whom

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they were sold in the ordinary course of business, and who after deducting the customary commission and the stamp tax, remitted the balance to Small, who after taking out his compensation, paid the remainder to Bassett. The plaintiff upon discovery notified the defendants of the theft and then brought this action to recover the value of the bonds. It is agreed by the parties that neither the defendants nor their employees at the time of the transaction had any knowledge that Small was not the rightful owner or lawfully in possession of the securities. The question for decision therefore is, whether the defendants, who received and sold the bonds and accounted for the proceeds to the apparent owner without notice of any infirmity in the title or of any circumstances which should have put them upon inquiry, can be held responsible in damages by the true owner for conversion.

The defendants undoubtedly exercised dominion over the bonds by converting them into money. If the property had consisted of chattels or non-negotiable documents, of which certificates of stock are an example, the plaintiff's title would not have been divested by a sale even to a purchaser for value and in good faith. *Scollans* v. *Rollins*, 173 Mass. 275, 278, and cases there collected. But to this rule there is a well recognized exception where the property consists of negotiable securities. *Heckle* v. *Lurvey*, 101 Mass. 344, 345. *Spooner* v. *Holmes*, 102 Mass. 503, 507. *O'Herron* v. *Gray*, 168 Mass. 573, 575, 576. It is settled by *Spooner* v. *Holmes*, that an action for the conversion of interest coupons of United States bonds payable to bearer cannot be maintained by the owner from whom they were stolen where the defendant in good faith and without gross negligence and without any notice from the plaintiff, received them as an agent in exchange from a party to the theft and paid the proceeds to his employer, receiving no benefit himself. The grounds of the decision are that, being negotiable promises for the payment of money, issued by the government and payable to bearer, the title passed by delivery and the coupons were "subject to the same rules as bank bills or other negotiable instruments payable in money to bearer." The rule also applies to coupons attached to State and town bonds for different instalments of interest when severed from the bonds. *Hartman* v. *Greenhow*, 102 U. S. 672. *Koshkonong* v. *Burton*, 104 U. S. 668. See 10 Cyc. 1172, note 42. If the coupons are negotiable promises

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to pay, the bond itself is in the same classification. *Gibson* v. *Lenhart*, 101 Penn. St. 522. As said by Mr. Justice Field in *Clark* v. *Iowa City*, 20 Wall. 583, "Coupons, when severed from the bonds to which they were originally attached, are in legal effect equivalent to separate bonds for the different instalments of interest."

The plaintiff in avoidance presses the argument that because the defendants received compensation they cannot escape responsibility. If profit is derived, this fact may have an important bearing, and in some cases may be found to be decisive of the recipient's good faith. *Allen* v. *Puritan Trust Co.* 211 Mass. 409. But the true test is not whether compensation is received for the act which works the conversion, or whether it was gratuitous. It is whether the transaction was entered upon in ignorance of the bearer's want of title or of any circumstances sufficient to put a reasonably cautious and prudent man upon inquiry, the ignoring of which amounts to proof of bad faith. *Hinckley* v. *Union Pacific Railroad*, 129 Mass. 52, 57. *Allen* v. *Puritan Trust Co. ubi supra.* *Fillebrown* v. *Hayward*, 190 Mass. 472, 479, 480. The case of *Varney* v. *Curtis*, 213 Mass. 309, is very plainly distinguishable. The pledgee was found by the trial judge and held by this court to have taken the coupon bonds with notice of the plaintiff's title, and consequently he was not a purchaser in good faith.

If however what has been said is decisive against the plaintiff's right of recovery for the sale of the government bond, she further contends that the telegraph and telephone bond is not within the rule. It is said in *Dexter* v. *Phillips*, 121 Mass. 178, 183, "In this country, it is well settled, that bonds issued by a railroad corporation payable to order or bearer, are negotiable instruments." We fail to discover any well grounded distinction as to negotiability between a railroad bond payable to order or bearer and the bond in question. A private corporation may make and issue promissory notes, and in the absence of an inhibiting statute has the power to issue negotiable bonds for the payment of money. *Commonwealth* v. *Smith*, 10 Allen, 448. *Union Cattle Co.* v. *International Trust Co.* 149 Mass. 492. *Manufacturing Co.* v. *Bradley*, 105 U. S. 175. *Dickerman* v. *Northern Trust Co.* 176 U. S. 181. The telegraph and telephone company is also a corporation charged with duties and obligations to the public, whose bonds like those of railroad companies are generally purchased and held as invest-

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ments, and are bought and sold in the market under the same conditions as to transfer and delivery. The provision shown by the word "convertible," that the holder at maturity will receive the face of the bond in money, or at his option an equivalent in stock of the corporation, does not destroy negotiability. It is a negotiable instrument within the meaning of R. L. c. 73, § 22, cl. 4; § 18, and possesses the essential attributes of commercial paper, for the conversion of which the defendants on the record cannot be charged. *Union Cattle Co.* v. *International Trust Co.* 149 Mass. 492. *Evertson* v. *National Bank of Newport*, 66 N. Y. 14. *American National Bank* v. *American Wood Paper Co.* 19 R. I. 149. *Hotchkiss* v. *National Banks*, 21 Wall. 354. *Cromwell* v. *County of Sac*, 94 U. S. 351, 362.

We are accordingly of opinion that judgment should be entered for the defendants, and it is

So ordered.

BARNEY GOLDSTEIN *vs.* SAMUEL W. TUCKER & another.

Middlesex. March 18, 1918. — May 24, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Mechanic's Lien, Dissolution by bond. *Bond*, To dissolve mechanic's lien. *Estoppel. Waiver. Attorney at Law. Agency*, Scope of authority.

Where the owner of certain land executed and delivered to a petitioner for the establishment of a mechanic's lien upon the land a bond to dissolve the lien with sureties properly approved, and the petitioner thereupon told one who proposed to purchase the land that the lien was discharged and waived by the giving of the bond but retained possession of the bond for over seven months without recording it, and the purchaser bought the land relying on the representations as to the dissolution of the lien but knowing that the bond was not recorded within ten days as required by R. L. c. 197, § 28, as amended by Sts. 1906, c. 223; 1909, c. 237, the petitioner has not thereby waived his lien, nor is he estopped, by reason of his representation based on a false idea as to the law, from pursuing his petition to judgment and sale.

An attorney at law, retained to prosecute a petition for the enforcement of a mechanic's lien, has no authority, by reason of his general retainer, to bind his client by statements to a stranger as to the effect of an unrecorded bond to dissolve the lien.

A statement of an attorney at law for a petitioner to enforce a mechanic's lien to a stranger, to the effect that the execution and delivery of a bond to dissolve the lien, which bond is unrecorded, dissolved the lien, is merely an expression

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of an opinion on a question of law, and, even if authorized by his client, will not operate to estop the client from prosecuting his lien.

St. 1915, c. 292, § 13, which became effective on January 1, 1916, does not affect a petition for the enforcement of a mechanic's lien filed previous to that date.

BILL IN EQUITY, filed in the Superior Court on May 18, 1916, and afterwards amended, seeking to enjoin the defendants from proceeding to enforce a warrant for the sale of certain real estate, issued upon a petition for the enforcement of a mechanic's lien.

The material allegations of the bill are described in the opinion. The defendants demurred. The demurrer was heard by *Lawton*, J., and by his order an interlocutory decree was entered sustaining it. Subsequently a final decree dismissing the bill was entered by order of *Fox*, J., and the plaintiff appealed.

The case was submitted on briefs.

E. C. Jenney & M. J. Sawyer, for the plaintiff.

G. M. Poland, & L. P. Jordan, for the defendants.

CROSBY, J. An interlocutory decree having been entered sustaining the demurrer to the plaintiff's amended bill, a final decree was entered dismissing the bill with costs. The case is before us on an appeal from that decree.

The bill as amended in substance alleges that the defendant MacLean had filed a mechanic's lien against the property of one Trackman and had brought a petition in the Superior Court to enforce the lien; that thereafter Trackman executed and delivered to MacLean a bond with sureties in due form to dissolve the lien; that on February 8, 1913, the sureties were duly approved, and thereafter MacLean retained possession of the bond until September 19, 1913, when it was recorded in the registry of deeds; that on the date when the sureties were approved, the defendant MacLean agreed with the plaintiff and with Trackman that the lien was discharged and waived by the giving of the bond; that MacLean's attorney, one Ivy, told the plaintiff that the bond dissolved the lien and that a conveyance of the property could be made free from the lien; that the plaintiff "relying upon the statements and representations made by the said Ivy to him . . . did on the 11th day of April, 1913, purchase said real estate from said Trackman, which purchase was made only in reliance upon what the defendant by his attorney had told him. . . ." The bill further alleges that on April 6, 1916, the defendant MacLean established

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his lien and on April 12, 1916, a warrant for the sale of the property was issued by the Superior Court and delivered to the defendant Tucker, a deputy sheriff, who was proceeding to sell the property by virtue of the warrant when this bill was filed. The plaintiff seeks to enjoin the defendants from selling the property and prays that a decree be entered that the bond operated as a dissolution and waiver of the lien, and that the warrant of sale be decreed to be void.

1. The statute provides that a bond given to dissolve a mechanic's lien shall be recorded within ten days after its approval. R. L. c. 197, § 28, as amended by St. 1906, c. 223, and St. 1909, c. 237. As the bond was not so recorded, the lien was not dissolved but remained in full force and effect. The fact that it was not recorded within the time fixed by the statute was known to the plaintiff when he purchased the property, and the fact that the defendant MacLean told him (the plaintiff) that the bond operated to dissolve the lien, cannot be held to be a waiver of his (MacLean's) rights under the lien; nor is he estopped from claiming thereunder because of his mistaken belief as to the legal effect of the bond. Its invalidity was equally apparent to both parties, and the plaintiff so far as the record shows was not misled nor deceived as to any material fact: when he purchased the property, he knew that a lien had been filed upon it and that the bond had not been recorded as the statute required; and he is charged with knowledge that it was void because not so recorded. Under these circumstances he cannot invoke the doctrine of equitable estoppel against the defendant. *Mackay* v. *Holland*, 4 Met. 69. *Robbins* v. *Potter*, 98 Mass. 532. *Conant* v. *Evans*, 202 Mass. 34, 38.

2. In the amended bill the plaintiff alleges that he bought the property "only in reliance upon what . . . his [the defendant's] attorney had told him . . . that at the time of said conveyance your petitioner believed that said mechanic's lien was discharged and waived as herein set forth as said respondent through his attorney had told him. . . ." There is no allegation that the defendant authorized his attorney to make the statements above referred to or that he knew they had been made. An attorney, by virtue of his general retainer, has no authority to bind his client by statements to a stranger respecting matters with which the

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client has no dealings. Accordingly, the statement that the lien was dissolved by the bond, — made by the defendant's counsel to the plaintiff before this suit was brought, — was ineffectual to bind the defendant. *Hahn* v. *Loker*, 229 Mass. 363, and cases cited. *Adams* v. *Frank*, 222 Mass. 215. *Shattuck* v. *Bill*, 142 Mass. 56. Aside from the lack of authority on the part of the defendant's attorney to speak for him, the statement as to the effect of the bond upon the lien was only the expression of an opinion on a question of law and would not operate as an estoppel. *Cartwright* v. *Gardner*, 5 Cush. 273. *Whitwell* v. *Winslow*, 134 Mass. 343.

3. It also is alleged by the plaintiff that by the enactment of St. 1915, c. 292, § 13, which became effective on January 1, 1916, all legal authority to enter a final judgment or to issue a warrant of sale to enforce a mechanic's lien was repealed, and that thereafter there was no legal authority to enter the judgment or issue the warrant of sale. The decisive answer to this contention is that § 17 of R. L. c. 197, under which the order of sale was authorized, was not repealed by St. 1915, c. 292; and as the proceedings were instituted before January 1, 1916, the case is not within that statute but is governed by R. L. c. 197, as amended by St. 1906, c. 223, and St. 1909, c. 237. *Chertok* v. *Morang*, 228 Mass. 598, 601.

Decree affirmed with costs.

GEORGE H. LEONARD & others *vs.* CARLETON AND HOVEY COMPANY.

Middlesex. March 18, 1918. — May 24, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Sale, Warranty. *Contract*, Construction. *Words*, "Provincial."

In a contract for the sale of cod liver oil the phrases "cold pressed provincial medicine oil" and "pure medicinal cod liver oil" were *held* to be descriptive of the kind and quality of oil required so as to constitute words of warranty.

In an action for the price of cod liver oil sold and delivered, where the defendant contended that he was not bound to take and pay for the oil because it was not of the kind and quality required by the contract, it was *held* that there was evidence warranting a finding that "cold pressed provincial medicine oil" and "pure medicinal cod liver oil" meant, as used in the trade, merchantable provincial or domestic oil made from the fresh livers of the cod and kindred fish, such as

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pollock, hake and haddock, excluding oil obtained from the livers of dog fish, and that the oil furnished by the plaintiff was of this kind and quality.

CONTRACT for the price of certain oil, principally cod liver oil, alleged to be due under four oral contracts afterwards confirmed by letters. Writ dated October 22, 1907.

In the Superior Court the case was referred to an auditor, who filed a report in which he found that the defendant owed the plaintiff a balance of $26,080.01.

Later the case was heard by *Sisk*, J., without a jury. He filed a memorandum of findings.

The third and fourth contracts mentioned in the opinion were found by the judge to be in their essential terms respectively as follows:

"3. Sept. 24, 1903, 150 barrels of 'cold pressed provincial medicine oil at $2.50 per gallon, F.O.B. Boston, net cash thirty days, or less 1 % if paid within ten days.' To be shipped and billed in lots as ordered up to March 1, 1904, samples to be sent for acceptance."

"4. Nov. 12, 1903, '25 barrels pure medicinal cod liver oil at $2.50 per gallon' to be delivered between the date of the contract and May 1, 1904, as required by the defendant."

Other material findings of the judge and the essential facts that could have been found upon the evidence are stated in the opinion.

The judge made the following rulings requested by the defendant.

"22. There is no obligation upon the defendant to take or pay for oil which is not merchantable under the description of medicinal cod liver oil."

"25. The defendant is under no obligation to receive or pay for any oil of which dogfish liver oil formed a constituent part."

"27. The defendant is under no obligation to receive or pay for any oil which by reason of defects in pressing, packing or storing is not fairly merchantable as pure medicinal cod liver oil."

The judge refused to make the other rulings requested by the defendant and made the first ruling requested by the plaintiffs, which was as follows:

"1. The oil complied with the contracts if it was merchantable oil of the sort named in the contracts and there was no warranty imposing any further obligation upon the sellers."

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He also made the eleventh ruling requested by the plaintiffs after modifying it so as to read as follows:

"If the defendant contracted for provincial or domestic cod liver oil, and if that oil is properly made from the fresh livers of the cod and cod family, such as hake, haddock and pollock, used indiscriminately, then the defendant had no right to reject the oil so made."

The judge also made the following finding: "I find the plaintiffs sold the oil in question to the defendant. While there was a mass of evidence as to the composition of the oil in question, upon the whole evidence I find that the oil was pure medicinal cod liver oil of the third class heretofore described, and complied with the contracts." He found for the plaintiffs in the sum of $26,180.15; and the defendant alleged exceptions.

W. R. Sears, (*A. M. Boal* with him,) for the defendant.

R. G. Dodge, (*F. W. Johnson* with him,) for the plaintiffs.

BRALEY, J. If the plaintiffs can recover, the defendant does not question the amount nor the computation of damages as awarded by the trial judge. But it contends that its liability has not been established. The terms used in the third and fourth contracts of sale over which the principal controversy has arisen, namely, "cold pressed provincial medicine oil" and "pure medicinal cod liver oil," being descriptive of the kind and quality, undoubtedly are words of warranty. *Fullam* v. *Wright & Colton Wire Cloth Co.* 196 Mass. 474. And the question for decision is whether the oil delivered corresponded to the warranty.

It appears that, while the plaintiffs did not carry the refined oil in stock, the presiding judge who tried the case without a jury could find that, after submitting a sample of the crude oil to the defendant and upon its acceptance, they procured from producers at various places along the Atlantic coast crude oil, as the judge further has found, of the same kind as the sample, which having been pressed or refined was delivered or stored in barrels at their place of business properly marked for identification and ready for shipment. If the oil conformed to the terms of the contracts the title as between the parties accordingly passed, and the defendant's refusal of performance would entitle the plaintiffs to the purchase price. *Barrie* v. *Quinby*, 206 Mass. 259, 266, and cases cited. *Cavanaugh* v. *D. W. Ranlet Co.* 229 Mass. 366.

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But, as the defendant was under no obligation to take and pay for inferior or adulterated oil, it asked the judge to rule that, if he "finds upon all the evidence that the plaintiffs sold the oil in question to the defendant, there is evidence to show that said oil was not pure medicinal cod liver oil, but was adulterated with oil from the livers of the dog fish." The judge however upon finding that "the plaintiffs sold the oil in question to the defendant," also found "that the oil was pure medicinal cod liver oil of the third class heretofore designated, and complied with the contracts," and the oil shipped as well as that which had been set apart "was not adulterated by any foreign oil." If these findings stand, it is plain that the defendant has no ground for recoupment, or any defence to the plaintiffs' claim.

The question of compliance with the warranty, which includes the issue of alleged adulteration, was one of fact dependent upon not only voluminous, but conflicting evidence. It is not necessary to review it in detail. The credibility of the witnesses and the weight to be given their testimony were for the trial judge, whose conclusions, if warranted, are final. The auditor's report, apart from the other evidence, is sufficient to sustain the initial finding, that under the third classification, cold pressed provincial oil and pure medicinal cod liver oil are known to the trade, and in the market as merchantable provincial, or domestic oil made from the fresh livers of the cod, and kindred fish such as pollock, hake, and haddock, as distinguished from Norwegian oil and Newfoundland oil extracted from the liver of the cod, which are known respectively as first and second class oils. The word "provincial" therefore never became a territorial warranty as the defendant contends. It is merely descriptive of the class of oil, and has the same commercial signification as the word "domestic." It also fully justified the judge in saying, that no oil obtained from the livers of dog fish had ever been mingled with the oil in question.

The judge's refusal to make certain findings of fact as requested by the defendant, and which would prevent recovery, furnishes no ground of exception, and, all the material and essential findings having been warranted for reasons sufficiently stated, the judge, after granting the defendant's twenty-second, twenty-fifth, and twenty-seventh requests, rightly refused to grant the remaining

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requests, which had become inappropriate under the conclusion he had reached on the evidence.

The granting of the plaintiffs' first request and of their eleventh request as modified, to which the defendant also excepted, are disposed of by what has been said, and, finding no error in the rulings to the admission of evidence, the exceptions should be overruled.

So ordered.

WALTER J. HOLDEN & others *vs.* J. STEVENS ARMS COMPANY & others.

Suffolk. March 20, 1918. — May 24, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Conspiracy. Pleading, Civil, Declaration.

A general allegation in a declaration in an action of tort against a number of defendants, that "all of the defendants herein named knowingly and intentionally participated in said unlawful scheme and conspiracy," is merely matter of characterization and does not state a cause of action.

The declaration in an action of tort against three corporations and ten individual defendants alleged that the plaintiff had earned a commission from one of the defendant corporations by procuring for it a contract for a sale of rifles to the purchasing agent of a foreign government, that this defendant corporation with the aid of the individual defendants entered into an arrangement with another of the defendant corporations to form the third defendant corporation to which the contract for the sale of rifles was transferred. It was not alleged that the defendant corporation for which the plaintiff had procured the contract had been dissolved or that it had transferred its assets to the new corporation in furtherance of a plan to compel the corporation that had procured the contract to commit a breach of it that would deprive the plaintiff of his commission. Nor was it alleged that the defendants had committed any tortious acts impairing the plaintiff's legal rights or preventing their enforcement by proper proceedings at law or in equity against the defendant corporation which owed the plaintiff the alleged commission. Upon demurrer it was *held* that the declaration set forth no cause of action in tort against the defendants.

TORT against three corporations and ten individual defendants. Writ dated September 30, 1916.

The essential allegations of the substituted declaration are described in the opinion. The plaintiffs alleged that the defendant J. Stevens Arms Company agreed to pay the plaintiffs a commission of fifty cents per rifle on such orders as they procured for it,

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payment to be made on delivery of the rifles by that corporation and that on March 10, 1915, the plaintiffs procured for the J. Stevens Arms Company an order from the purchasing representatives of the Imperial Government of Russia for one million rifles at the agreed price of $25 per rifle. The second count concluded, as also substantially did the first count, as follows:

"The plaintiffs say that the said conspiracy and agreement between the defendant J. Stevens Arms Company and the defendant Westinghouse Electric and Manufacturing Company, and the bringing into existence and the formation of the defendant New England Westinghouse Company, as herein set forth, were made for the sole purpose of attempting to unlawfully deprive the plaintiffs of their just commissions which they had earned in the procurement of the said customer for the benefit of the defendant J. Stevens Arms Company and the defendant Westinghouse Electric and Manufacturing Company. The plaintiffs further say that, although requested to do so, the defendant J. Stevens Arms Company has refused and neglected to pay for the procuring of said customer as aforesaid, and the plaintiffs have been thereby entirely deprived of the benefits of said contract.

"Wherefore the plaintiffs say that they have been damaged in the sum of $500,000.

"Both counts are for one and the same cause of action."

The defendants severally demurred to the declaration.

The case was argued on the demurrers before *Jenney*, J., who made orders sustaining each of the demurrers, and the plaintiffs appealed. Later, on motion of the defendants, it was ordered that judgment be entered for the defendants upon the demurrers.

From the final judgment entered in pursuance of this order the plaintiffs appealed.

D. H. Coakley & D. Stoneman, for the plaintiffs, submitted a brief.

J. L. Hall, for the defendants.

BRALEY, J. The plaintiffs having performed their contract with the defendant the J. Stevens Arms Company, as set forth in the declaration and admitted by the demurrants, had earned their commission which could be recovered in an action of contract, but not in tort, which is the form of the present action. It is how-

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ever further alleged, that, when the plaintiffs' success in procuring the order for the manufacture of rifles from the Imperial Russian Government seemed to be reasonably certain of consummation, the company entered into an arrangement with the defendant the Westinghouse Electric and Manufacturing Company, which was engaged in a similar business, whereby a scheme in which the individual defendants actively joined was set on foot to organize the defendant corporation the New England Westinghouse Company to acquire the contract procured by the plaintiffs for the Stevens Company.

The New England Company, whose stock was to be subscribed for by persons having no financial interest in its welfare, having accordingly been incorporated and the capital stock of the Stevens Company having been sold to the Westinghouse Company, the Russian contract was transferred to the New England Company by whom it has been performed. It does not appear that the Stevens Company has been dissolved. Nor has the Westinghouse or the New England Company taken over its assets in furtherance of a plan without any justification to induce or coerce the Stevens Company to commit a breach the consequences of which would effectually deprive the plaintiffs of the benefit of their contract. *Garst* v. *Charles*, 187 Mass. 144. And, notwithstanding the allegations that the capital stock of the New England Company is owned by the Stevens and Westinghouse companies, and the Stevens Company "has refused to recognize the plaintiffs in their claims for commission on orders for rifles to be filled," the plaintiffs fail to allege any tortious acts impairing their legal rights or preventing their enforcement by proper proceedings against the Stevens Company either at law or in equity. *Beekman* v. *Marsters*, 195 Mass. 205.

The general allegation that "all of the defendants herein named knowingly and intentionally participated in said unlawful scheme and conspiracy" does not create a cause of action. It is only matter of characterization. The plaintiffs must rely on an actionable wrong in which all those who participated are principals, and therefore are liable either jointly or severally. *Gurney* v. *Tenney*, 197 Mass. 457. *Feneff* v. *Boston & Maine Railroad*, 196 Mass. 575. We know of no legal alchemy by which the allegations of the declaration can be transmuted into a cause of action.

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The demurrers were sustained rightly, and the judgment for the defendants must be affirmed.

So ordered.

KATHERINE L. O'NEILL *vs.* QUEEN INSURANCE COMPANY OF AMERICA.

Suffolk. March 20, 1918. — May 24, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Insurance, Oral, Of motor vehicle. *Contract*, What constitutes.

If an insurance company issues a policy against fire and theft upon a motor car to a person who does not own the car and has no insurable interest in it and afterwards through an agent agrees orally to substitute in the policy the name of the owner of the car in place of the name of the person to whom it was issued, this gives the owner, in case of loss by theft and fire, no right to bring an action on the policy; because the policy originally was void and its transfer could give no right, and the oral agreement to substitute the name of the owner was without consideration and did not create a new and independent contract of insurance.

In the case in which the point above stated was decided it appeared that the application to substitute the name of the owner of the car in the policy was made to a clerk employed by the agents of the insurance company, who said "that he would attend to it," and that no such change in the policy ever was made, and it was *pointed out* that, in assuming for the purposes of the decision that the statement of the clerk "that he would attend to it" amounted to an agreement to make the change and also that the agents were authorized to make such a change, neither of these points was decided.

CONTRACT by the owner of a motor car upon an alleged oral contract to insure the car against fire and theft from a date preceding March 9, 1915, when the car was stolen from the plaintiff and thereafter was destroyed partially by fire. Writ dated February 4, 1916.

In the Superior Court the case was tried before *Hall*, J. At the close of the plaintiff's evidence, which is described in the opinion, the defendant rested, and thereupon by agreement of counsel the judge ordered a verdict for the defendant and reported the case for determination by this court, with the stipulation that, if the ordering of the verdict was right, judgment was to be entered for the defendant on the verdict; and that, if the verdict was ordered improperly, judgment was to be entered for the plaintiff in the sum of $3,600 with interest thereon from the date of the writ.

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A. T. Smith, (*W. J. Drew* with him,) for the plaintiff.

J. G. Palfrey, for the defendant.

CROSBY, J. This is an action to recover for the alleged breach of an oral contract to insure the plaintiff's motor car against theft and fire. The facts are not in dispute. The policy in question was issued by the defendant to Arthur O'Neill, (a brother of the plaintiff) as the insured, on June 26, 1914, for one year from June 6, 1914. In the summer of 1914 Arthur O'Neill made a claim under the policy and collected $32 for the loss of a tire. The following November he applied for and obtained from the defendant a change in the policy by omitting the clause which limited recovery for loss by theft to the excess above $25, and a rider to that effect, bearing date of November 30, 1914, was issued by the defendant to him. Soon afterwards, and during the same month, he directed the insurance brokers regularly employed by him, to apply to the defendant for a change in the name of the insured from Arthur O'Neill to Katherine O'Neill. He also directed a similar change to be made in a liability policy issued by another company upon the same car. These applications were made to one Kane, a clerk employed by the defendant's agents (Dewick and Flanders) who said "that he would attend to it;" but no such change in the policy issued by the defendant ever was made. The motor car, while left temporarily on the street by Arthur O'Neill on March 9, 1915, was stolen, and before it was found was partially destroyed by fire on May 3, 1915. The plaintiff filed a sworn proof of loss with the defendant on April 29, 1915, in which the following appears: "By your policy of Insurance No. 2286. Issued at your Boston Agency, dated June 26, 1914, you insured Arthur O'Neill who assigned to Katherine L. O'Neill. . . ." The car was owned by the plaintiff when the policy was issued and remained her property and was registered in her name; it never was owned by Arthur O'Neill. The plaintiff does not claim under the original policy, but seeks to recover upon an oral contract of insurance; while it is the contention of the defendant that no valid agreement was made by it.

It is plain that as Arthur O'Neill had no insurable interest in the car the policy was void as against him. It is also true that, if he had assigned his interest in the policy to the plaintiff with the assent of the defendant, no valid contract would have been created,

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as the plaintiff would have taken by such assignment only such rights as her brother had under the policy. *McCluskey* v. *Providence Washington Ins. Co.* 126 Mass. 306. *Mowles* v. *Boston Ins. Co.* 226 Mass. 426. But the plaintiff contends that the defendant agreed to substitute her name in place of that of her brother as the insured, and that such agreement constituted a valid and enforcible obligation. The difficulty with this contention is, that, if it be assumed that the statement of the clerk of the defendant's agents "that he would attend to it" amounted to an agreement to make the change, and also, that the agents were authorized to make such change upon the authority of *Sanford* v. *Orient Ins. Co.* 174 Mass. 416, 422, still such an agreement was wholly without consideration as between the plaintiff and the defendant. At most it was only a voluntary undertaking on the part of the defendant and did not create a new and independent contract of insurance. *McCluskey* v. *Providence Washington Ins. Co. supra.*

Although the counsel for the plaintiff state in their brief that "she does not contend there was any oral contract whereby she was 'covered' or insured in any way," and that "her whole case is predicated upon the claim that she was not insured," and that "the defendant company agreed to issue a policy of insurance against theft and fire to her . . . and that it failed to do so, and thereby became liable in damages for breach of contract," we are of opinion that the agreement, properly construed, plainly contemplated the delivery either of a new policy or the issuance of a rider in connection with the original; indeed it is the contention of the plaintiff that she supposed that such a rider had been issued and did not discover that it had not been so issued until after the car was stolen. It was the duty of the plaintiff, within a reasonable time, to have taken some steps to ascertain whether the oral contract had ripened into a formal contract of insurance. The case cannot be distinguished in principle from *McQuaid* v. *Aetna Ins. Co.* 226 Mass. 281, and *Mowles* v. *Boston Ins. Co. supra;* it is clearly distinguishable from *Sanford* v. *Orient Ins. Co. supra.*

In accordance with the stipualtion of counsel, the entry must be, judgment for the defendant on the verdict.

Ordered accordingly.

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FITZ HENRY BECKLES'S (dependent's) CASE.

Suffolk. March 21, 1918. — May 24, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Workmen's Compensation Act. Evidence, Before Industrial Accident Board.

In a claim under the workmen's compensation act it was found by the Industrial Accident Board, that a hydraulic elevator, in operating which the employee was killed, was at the time of the accident in a defective condition and had been so for a long time before and that the employer, although grossly negligent "in continuing to maintain and operate an elevator which experience should have told the employer could not be put into a perfectly safe condition by the ordinary repairs attempted and made," was not guilty of "serious and wilful misconduct" within the meaning of St. 1911, c. 751, Part II, § 3, as amended by St. 1912, c. 571, § 1, so as to require the amount of compensation to be doubled, and it was *held* that this finding was not unwarranted as matter of law.

It here was *pointed out*, that in cases arising under the workmen's compensation act, although questions of evidence apparent on the record will be considered in accordance with general equity practice, errors in the admission or exclusion of evidence will not be made the ground for the reversal of a decree unless this is necessary to protect the substantial rights of the parties. Citing *Pigeon's Case*, 216 Mass. 51, 55.

In the present case it was *held* that the substantial rights of the claimant were not affected by the exclusion by the Industrial Accident Board of evidence of the condition of the elevator about six months after the accident, the board having found that it was in a defective condition at the time of the accident and for a long time before.

It also was *held* for the same reason that the claimant was not harmed because certain evidence relating to the condition of the elevator after the accident, which was admitted *de bene* by the arbitration committee, afterwards was excluded by the committee.

APPEAL to the Superior Court under St. 1911, c. 751, Part III, § 11, as amended by St. 1912, c. 571, § 14, from a decision of the Industrial Accident Board awarding compensation of $2 a week for five hundred weeks to or for the benefit of Jane Viola Beckles of Barbadoes, the partly dependent widow of Fitz Henry Beckles, who died from an injury received on January 14, 1915, in the course of and arising out of his employment when he was in the employ of the S. Vorenberg Company in Boston, and deciding that the injury of the employee was not due to the serious and wilful misconduct

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of the employer or of any person regularly entrusted with and exercising the powers of superintendence.

The case was heard by *Wait*, J. The material facts are stated in the opinion. The judge made a decree in accordance with the decision of the Industrial Accident Board. Both the claimant and the insurer appealed.

A. F. Flint, for the dependent widow.

G. Gleason, for the insurer, was not called upon.

CROSBY, J. This is a proceeding under the workmen's compensation act. The employee was killed on January 14, 1915, while operating an elevator. Aside from the exclusion by the Industrial Accident Board of certain evidence offered by the claimant, the question presented is, whether the finding of the board that the injury was not due to the serious and wilful misconduct of the employer was wholly unwarranted. St. 1911, c. 751, Part II, § 3 as amended by St. 1912, c. 571, § 1.

If the finding as made was not warranted, the claimant is entitled to have the compensation doubled in accordance with the statute. Upon this branch of the case the board found, that "the injury was not due to the serious and wilful misconduct of the employee, and that it was not due to the serious and wilful misconduct of the employer or of any person regularly entrusted with and exercising the powers of superintendence; that the immediate cause of the injury and death of the employee was his own grossly negligent act, which act was not necessitated by any emergency, and that the contributing cause was the gross negligence of the employer in continuing to maintain and operate an elevator which experience should have told the employer could not be put into perfectly safe condition by the ordinary repairs attempted and made."

The words "serious and wilful misconduct" of a subscriber, as used in the act, have been interpreted by this court as meaning something more than mere negligence or even gross or culpable negligence: they are defined as involving "conduct of a *quasi* criminal nature, the intentional doing of something either with the knowledge that it is likely to result in serious injury or with a wanton and reckless disregard of its probable consequences." *Burns's Case*, 218 Mass. 8, 10. The Industrial Accident Board found that the elevator at the time of the accident and for a long

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time before had been in a defective condition; that it had a tendency to creep, which was common to hydraulic elevators of that type; and that the employer frequently had caused repairs to be made upon it.

Upon the evidence presented, the finding of the board was not unwarranted as matter of law that the conduct of the subscriber in permitting the elevator to be maintained and operated in the condition in which it was at the time of the accident was not "serious and wilful." The finding that the subscriber was grossly negligent falls short of a finding that he was guilty of serious and wilful misconduct. *Riley's Case*, 227 Mass. 55. *Freeman* v. *United Fruit Co.* 223 Mass. 300, 302. *Burns's Case, supra*, and cases cited. *Nickerson's Case*, 218 Mass. 158, 160. *Johnson* v. *Marshall Sons & Co. Ltd.* [1906] A. C. 409, 411.

The remaining questions relate to certain exceptions taken by the claimant to the exclusion of evidence by the arbitration committee. Although questions of evidence apparent on the record will be considered in accordance with general equity practice, errors in the admission or exclusion of evidence will not be made the ground for the reversal of a decree, unless this is necessary to protect the substantial rights of the parties. *Pigeon's Case*, 216 Mass. 51, 55.

The evidence offered by the claimant that from the date of the accident to a date after July 13, 1915, there was no material change in the condition of the elevator; that "on April 1, 1915, . . . [one Malone, an elevator inspector,] made a complaint to the building department as to the condition of this elevator and its equipment and ordered radical changes to be made therein which would necessitate a thorough examination of the machinery and the repacking of the cylinder and valve;" "that on June 30, 1915, . . . [he] ordered the elevator shut down until it was put in a safe condition, . . . [and] that the changes and repairs which he ordered made were unreasonably delayed and were not completed until Oct. 6, 1915," was rightly excluded. Evidence of the condition of the elevator after the accident or orders respecting it or repairs thereafter made was incompetent, except so far as it tended to show its condition at the time of the accident. If any of the evidence offered was admissible for that purpose, it is plain that the substantial rights of the claimant were not affected by its exclusion, as the board found that it was in a defective condition

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at the time of the accident and for a long time before; nor was the claimant harmed because certain evidence relating to the condition of the elevator after the accident admitted *de bene* by the arbitration committee afterwards was excluded by the committee.

We do not perceive any error of law in the admission or exclusion of evidence or in the finding made by the board. The decree of the Superior Court is to be affirmed.

So ordered.

ELIZABETH J. WENTZELL *vs.* BOSTON ELEVATED RAILWAY COMPANY.

SARAH A. WENTZELL *vs.* SAME.

WILLIAM C. WENTZELL *vs.* SAME.

SCHOLASTICA McDOUGALL *vs.* SAME.

Middlesex. March 21, 1918. — May 24, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Negligence, Trespasser. *Wrongdoer. Wilful or Wanton Misconduct. Trespass. Motor Vehicle.*

Before the passage of St. 1915, c. 87, any person travelling on a highway in an unregistered motor vehicle was a trespasser upon the highway and, if he was injured by a collision of the motor vehicle with a street railway car, he could hold the street railway corporation liable for his injuries only by showing that the collision was caused by the wilful or wanton conduct of its motorman or of some other of its agents.

No degree of negligence can make one liable for an injury to a trespasser. To establish such liability it must be shown that the person who injured the trespasser was a wilful or wanton wrongdoer in causing the injury.

An alleged wrongdoer acts wilfully or wantonly only when he inflicts an injury intentionally or is so utterly indifferent to the rights of others that he acts as if such rights did not exist. By BRALEY, J.

If a motorman operates a street railway car in a city street at the rate of from twenty-five to forty miles an hour and in doing so runs into a motor car, which is being driven slowly across the track to turn into a connecting street, and if after the collision the street railway car runs a distance of one hundred and fifty feet before it is brought to a stop, these facts, although they are evidence of negligence, are not evidence of wanton or reckless misconduct on the part of the motorman which would make the street railway corporation liable to a trespasser on the highway in the motor car injured by the collision.

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FOUR ACTIONS OF TORT for injuries respectively sustained by the plaintiffs on June 7, 1914, by being run into by an electric street railway car of the defendant on Broadway in Somerville when they were in a motor car which was owned and was being driven carefully by the plaintiff William C. Wentzell and which he had turned across the tracks to go into Irving Street, a connecting street on which the plaintiffs lived. Writs dated March 8, 1915.

The plaintiffs' amended declarations alleged that at the time of the collision the defendant's car was being operated "at an unlawful, unreasonable and dangerous rate of speed in and upon said highway and in a reckless or wanton manner."

The defendant's amended answers alleged that each plaintiff was travelling in a motor car not registered in accordance with St. 1909, c. 534, as amended by St. 1912, c. 400, and St. 1914, c. 204.

In the Superior Court the cases were tried together before *Hitchcock*, J. The substance of the plaintiffs' evidence is stated in the opinion. The plaintiff William C. Wentzell held an operator's license regularly issued to him. He had taken steps to secure a license for the car in which they were driving, but on the day of the accident, the license not having been issued for this car, he had taken the plate with the registration number belonging to another car which he owned and had put it upon this car, but the registration license for the car in question had not been issued. The plaintiff William C. Wentzell testified that, when he started to cross the defendant's tracks to go into Irving Street, the defendant's car was about three hundred feet away and that his motor car "was then going slowly, probably not over five miles an hour, perhaps less."

At the close of the plaintiffs' evidence the judge, upon a motion of the defendant, ordered the jury to return a verdict for the defendant in each of the four cases; and the plaintiffs alleged exceptions.

St. 1915, c. 87, referred to in the opinion, is as follows:

"Section 1. Violation of the provisions of section nine of chapter five hundred and thirty-four of the acts of the year nineteen hundred and nine, which provides for the registration and equipment of motor vehicles, shall not constitute a defence to actions of tort for injuries suffered by a person, or for the death of a person,

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or for injury to property, unless it is shown that the person injured in his person or property or killed was the owner or operator of the motor vehicle the operation of which was in violation of said provisions, or unless it is shown that the person so injured or killed, or the owner of the property so injured, knew or had reasonable cause to know that said provisions were being violated.

"Section 2. This act shall take effect upon its passage, but shall apply only to actions or causes of actions hereafter accruing.

"Approved March 20, 1915."

W. B. Grant, (*M. Stone* with him,) for the plaintiffs.

H. D. McLellan, for the defendant.

BRALEY, J. The motor car in which the plaintiffs were travelling when it came into collision with the defendant's car not having been duly registered, the occupants were trespassers upon the highway, as, the accident having occurred on June 7, 1914, none of the cases are within the St. of 1915, c. 87. *Feeley* v. *Melrose*, 205 Mass. 329. The plaintiffs nevertheless contend that, even if they were violators of the law, the defendant is responsible, because it could be found that the conduct of the motorman was reckless, wanton and wilful. *Dudley* v. *Northampton Street Railway*, 202 Mass. 443, 449.

The city ordinance that "No car shall be allowed to attain a greater rate of speed than ten miles an hour" having been properly excluded because never approved by the board of railroad commissioners or their successors, the public service commission, as required by St. 1906, c. 463, Part III, § 74, the plaintiffs urge that, when coupled with the failure of the motorman to shut off the electric current or to apply the brakes seasonably, the rate of speed was so excessive as to make out a case for the jury. But the conduct required to be proved is something different from negligence even when the degree may be found under our law to be gross. The alleged wrongdoer acts wantonly and wilfully only when he inflicts the injury intentionally or is so utterly indifferent to the rights of others that he acts as if such rights did not exist. The result is a wilful not a negligent wrong. *Freeman* v. *United Fruit Co.* 223 Mass. 300, and cases cited.

It is true the jury could find that the car was moving at a speed of twenty-five to forty miles an hour, and that it ran a distance of one hundred or one hundred and fifty feet after the impact

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before being brought to a stop. We are however of opinion that the circumstances are insufficient to show that the motorman acted wantonly or recklessly. As was said in *Dean* v. *Boston Elevated Railway*, 217 Mass. 495, where the conditions of operation were very similar to those of the present case, "The failure of the motorman to see the automobile before he did in such situation as it was, and to bring his car to a stop quicker, while evidence of negligence, fails to reach to the kind of conduct required as a basis for recovery by the plaintiffs."

The exceptions should be overruled, and it is

So ordered.

BERTHA SALVIN *vs.* PHILIP SIDMAN.

Suffolk. March 21, 1918. — May 24, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Judgment. Municipal Court of the City of Boston. Surety. Bond, To dissolve attachment. *Practice, Civil,* Amendment.

In the absence of fraud or collusion, a judgment entered against two defendants in the lawful exercise of the power of the court is conclusive against a surety upon a bond to dissolve an attachment given by one of the defendants.

Accordingly, it is not a valid defence on the part of such surety in an action against him upon such a bond, that the judgment was entered before the time had expired for the filing of an answer by his principal's co-defendant, who had been made a party defendant by an amendment after the giving of the bond.

An amendment to the writ and declaration in an action against the maker of a promissory note, adding as a party defendant an indorser of the note, does not change the liability upon a bond to dissolve an attachment given by the first defendant before the allowance of the amendment.

Therefore, the allowance of such an amendment without notice to the surety does not discharge such surety, and, after judgment against both defendants by default, the plaintiff may maintain an action upon the bond against such surety.

CONTRACT against the surety on a bond to dissolve an attachment, given in an action upon a promissory note by Bessie Silverman, defendant, before the allowance of an amendment therein adding as a defendant M. Silverman, as described in the opinion. Writ in the Municipal Court of the City of Boston dated June 19, 1917.

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The material facts in evidence at the trial in the Municipal Court and the substance of the rulings of the trial judge are described in the opinion. There was a finding for the plaintiff in the sum of $114.11 and interest from May 18, 1917. The case was reported to the Appellate Division, where the report was dismissed. The defendant appealed.

The case was submitted on briefs.

S. Sigilman & C. H. Dow, for the defendant.

S. L. Wolfson, for the plaintiff.

CROSBY, J. This is an action against a surety on a bond to dissolve an attachment. The original action (in which the bond was given) was brought in the Municipal Court of the City of Boston by the plaintiff against Bessie Silverman. After the bond was given the plaintiff filed a motion to amend the writ and declaration by adding thereto the name of M. Silverman, otherwise known as Morris Silverman, as a party defendant. This motion was allowed by the court with the consent of the attorney of record of the original defendant, who on the same day entered his appearance for Morris Silverman. It did not appear that the defendant in this action had notice of the amendment. Both defendants in the original action afterwards were defaulted and judgment was entered against them; before the entry of such judgment, the plaintiff filed a promissory note for $75 signed by B. Silverman on the face, bearing the indorsement "Mr. M. Silverman."

The first contention of the defendant is that the judgment in the original action was entered upon a default and before the time given for filing an answer by the defendant M. Silverman, under the rules of the Municipal Court of the City of Boston, had expired, and that therefore the judgment was prematurely entered. But the judgment having been entered in the lawful exercise of the power of the court and in the absence of fraud or collusion, is conclusive against the defendant in the case at bar. *Tapley* v. *Goodsell*, 122 Mass. 176, 182. *Cutter* v. *Evans*, 115 Mass. 27. *Tracy* v. *Maloney*, 105 Mass. 90.

The defendant also contends that the allowance of the amendment without notice to him, the effect of which was to add M. Silverman as a party defendant after the bond had been given, was a discharge of the surety. It has been held by this court that

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an action cannot be maintained against a surety on a bond to dissolve an attachment, if after the bond is given a different plaintiff is substituted by amendment, of which the surety was given no previous notice as required by R. L. c. 173, § 121. *Werlin* v. *Equitable Surety Co.* 227 Mass. 157. *Frank* v. *Millen*, 226 Mass. 71. *Mathews Slate Co.* v. *Sweeney*, 219 Mass. 285.

It is plain that a surety upon a bond should not be held liable without notice to him of an amendment which imposes upon him a liability greater or different than that which he assumed by signing the bond. In the case at bar the amendment did not alter or affect the defendant's liability — its allowance simply added a party defendant who, with the original defendant, became liable to the plaintiff for the debt upon the entry of judgment. It was allowed by the consent of the attorney of the original defendant, who was also the attorney for the defendant named in the amendment and is one of the attorneys for the defendant in the case at bar. The defendant's obligation as surety on the bond is that Bessie Silverman will pay the judgment and costs within thirty days from the date of its entry against her. The allowance of the amendment created no greater or different liability than existed before, and did not make the defendant chargeable for any default on the part of M. Silverman.

As the defendant was not affected by the amendment he was not entitled to notice of its allowance. It follows that the ruling of the presiding judge "that the particular amendment, under this form of bond, did not discharge the surety," was correct. *Leonard* v. *Speidel*, 104 Mass. 356. *Sanderson* v. *Stevens*, 116 Mass. 133. *Poole* v. *Dyer*, 123 Mass. 363. See *Doran* v. *Cohen*, 147 Mass. 342; *Driscoll* v. *Holt*, 170 Mass. 262, and cases cited.

If the action had been discontinued as against Bessie Silverman upon the allowance of the amendment, or if a new party plaintiff had been added without notice to the surety, a different question would have been presented. The case at bar is clearly distinguishable from *Tucker* v. *White*, 5 Allen, 322, *Richards* v. *Storer*, 114 Mass. 101, *Frank* v. *Millen*, *supra*.

Order dismissing report affirmed.

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CHARLES COLLINS *vs.* HERBERT W. SPLANE.
SAME *vs.* MCKIE LIGHTER COMPANY.

Suffolk. March 22, 25, April 8, 1918. — May 24, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Negligence, Invited person, In raising ship. *Agency*, Scope of employment, Ratification, Existence of relation. *Practice, Civil*, New trial. *Jury and Jurors.*

In an action by the owner of a motor boat against a lighter company for personal injuries caused by the giving way of apparatus of the defendant, which was being used to raise the stern of a tug owned by a third party while the plaintiff was beneath the stern with his boat carrying the tug's engineer in order that the engineer might remove a hawser which had become entangled in the propeller, it is unnecessary for the plaintiff, in order to show that he rightfully was there, to show more than that he undertook to assist at the request of the captain of the tug.

Upon a review of the evidence at the trial of the action above described, it was *held* that there was evidence warranting findings that employees of the defendant acted within the scope of their authority in undertaking at the request of the captain of the tug to hoist the stern of the tug for the purpose above described, and that, if their action in that regard originally was unauthorized, it afterwards was ratified by the company's officers, who, with full knowledge of the circumstances, presented and received payment of a bill for the work thus performed.

In the action above described there was evidence which warranted findings that the defendant's employees in hoisting the tug used a hook attached to the block of a tackle holding a sling which had been passed under the stern of the tug and which was so worn, chafed and frayed that, when subjected to the strain necessary for the work, it gave way and the tug's stern descended upon the plaintiff, and that this condition could have been ascertained and remedied by the exercise of reasonable diligence on the part of the defendant's employees. *Held*, that a verdict for the plaintiff was warranted.

If a juror during the trial of an action of tort on his own initiative privately takes a view of premises, the character of which is an issue at the trial, thus obtaining evidence outside of that introduced in the court room, such conduct does not require a new trial as a matter of law; and where, upon a motion for a new trial based upon such conduct of the juror, the trial judge finds, on evidence warranting the finding, that the conduct of the juror did no harm to the party against whom a verdict was rendered, the judge in his discretion may deny the motion.

If the captain of a tug boat, in whose propeller a hawser has become entangled, while on his way to the wharf of a lighter company whose assistance he is to procure to raise the stern of the tug while the hawser is being disentangled, within the scope of his authority hails the owner of a motor boat and makes a contract with him to take aboard the tug's engineer and, when the lighter company has the stern of the tug sufficiently elevated, to go with his boat beneath

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the stern while the tug's engineer removes the hawser; and if, while the owner of the motor boat thus is under the stern of the tug, it falls and strikes the owner of the motor boat because a part of the apparatus negligently used by the lighter company is defective, the owner of the tug is under no liability to the owner of the motor boat for injuries thus received.

TWO ACTIONS OF TORT for personal injuries received by the plaintiff on December 3, 1915, under the circumstances described in the opinion, by the falling of the stern of a tug, owned by the defendant in the first action and others, while he was assisting her captain and employees of the defendant in the second action to remove a rope or hawser which had become entangled in the tug's propeller. Writs dated June 15, 1916.

The declarations in both actions contained allegations that on December 3, 1915, the plaintiff "entered into a contract with" the defendant in the first action "to remove a hawser from around the propeller of the tug, which was owned by" that defendant "and operated, controlled and managed by him, his servants, agents, or employees;" and that the plaintiff received his injuries "owing to the joint negligence of the" defendants in the two actions. Further allegations of the declaration in the first action were that the negligence of the defendant therein "consisted in the negligent, careless and improper manner in which the defendant allowed the work of raising the tug . . . to be done, the negligence and carelessness of the defendant in supervising and overseeing the way in which the work was done, in using improper methods to raise said tug, in using improper and defective tools, material and machinery in doing said work and negligence and carelessness of the captain of said tug." The further allegations of the declaration in the second action were that the negligence of the defendant in that action "consisted in furnishing improper and defective material, machinery and tools with which the tug Ida M. Chase was raised, improperly, carelessly and negligently raising of the said tug and negligence and carelessness on the part of the engineer of said defendant in performing his work and negligence of the defendant in employing unfit, improper and inexperienced employees to do the work."

In the Superior Court, the actions were tried together before *Hall*, J. It appeared that the defendant in the first action at the time of the injury to the plaintiff was a subscriber under the

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workmen's compensation act, and there was no evidence that the tug was used in interstate commerce. Other material evidence is described in the opinion. At the close of the evidence, the defendants moved that verdicts be ordered in their favor. These motions were denied.

The defendant in the first action requested, among others, the following rulings:

"12. The plaintiff Collins was by virtue of his employment by Dodge the employee of either this defendant or the Packard Dredging Company; if of the former, the plaintiff's rights are determined by the workmen's compensation act or otherwise and this defendant is not liable in this action; if of the latter company, this defendant is not liable and the latter company is.

"13. The test to determine the legal responsibility of the Dredging Company or of this defendant for the conduct of Dodge is whether in the particular service performed by him he continued subject to the control and direction of Splane as to the means to be employed and the result to be achieved or became subject to that of the Dredging Company."

On the subject raised by these requests the judge charged the jury as follows: "If he [the plaintiff] went in there as an employee, why, then, if you should find that he was Splane's employee, I instruct you as matter of law that the workmen's compensation act is a complete defence so far as Mr. Splane's case is concerned," and he left it to the jury to determine whether the plaintiff was an employee or an independent contractor. The jury, as stated below, found for the plaintiff.

The defendant in the second action asked for the following rulings, all of which were refused:

"1. Upon all the evidence and pleadings the plaintiff is not entitled to recover.

"2. That the plaintiff was a trespasser at the time he received the injuries complained of.

"3. That the defendant, the McKie Lighter Company, owed the plaintiff no duty except to refrain from wilfully injuring him.

"4. That as against the defendant, the McKie Lighter Company, the plaintiff was a bare licensee.

"5. That the defendant owed the plaintiff no duty, therefore the plaintiff is not entitled to recover.

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"6. That the defendant owed the plaintiff no duty except to refrain from wilfully injuring him.

"7. That the work of raising the Ida M. Chase was not done by or under the direction or control of the defendant, the McKie Lighter Company.

"8. The mere fact that the lighter used in hoisting the Ida M. Chase was the property of the McKie Lighter Company and that the engineer, who operated the engine, by which the Ida M. Chase was hoisted was employed by the McKie Lighter Company is no evidence that the work was being done by or under the control or direction of the defendant, the McKie Lighter Company."

The jury found for the plaintiff in each action in the sum of $10,000. Each defendant then moved for a new trial on the ground described in the opinion. Both motions were denied. The defendants alleged exceptions.

E. C. Stone, for the defendant Splane.

E. I. Taylor, for the defendant McKie Lighter Company, submitted a brief.

D. E. Hall, (*G. H. Mellen & W. B. Keenan* with him,) for the plaintiff.

BRALEY, J. These actions are at common law for personal injuries alleged to have been caused by the negligence of the defendants, who, if responsible, are liable as concurrent tortfeasors. *Feneff* v. *Boston & Maine Railroad,* 196 Mass. 575. And after verdicts for the plaintiff the cases are before us on the defendants' separate bills of exceptions. It is not contended that the plaintiff was careless and on uncontradicted evidence it appears that when injured he was engaged with his motor boat in assisting the engineer of the tug to remove a rope or hawser with which the propeller wheel had become entangled or fouled, and that in order to free the wheel it had become necessary to raise the stern of the tug far enough above the water level to enable the plaintiff to remain underneath while the engineer performed the work. The defendants, also, make no contention, that after the stern of the tug had been elevated sufficiently at the lighter company's wharf, a part of the hoisting apparatus gave way, causing the tug to fall and in its descent to strike and injure the plaintiff.

We first consider the exceptions of the lighter company, hereafter referred to as the defendant. The first request which the judge

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refused to give asked for a directed verdict, because on "all the evidence and the pleadings the plaintiff is not entitled to recover." The jury could find that the defendant Splane, acting as "managing owner" and agent for the co-owners, let the tug to the Packard Dredging Company which was to furnish coal, water, oil, and food, while he paid the crew and the captain, who remained in command of the vessel. The wheel having been fouled while the tug was being used by the dredging company, the superintendent of the dredging company directed the captain to go to the defendant's wharf for the purpose already described, and while the tug was on the way, or approached the lighter lying next to the wharf, the captain, observing the plaintiff, engaged him to assist the engineer. It is unnecessary to decide whether the plaintiff was a fellow servant of the captain, or an independent contractor, or whether in making the contract the captain acted as the agent of the defendant Splane or of the dredging company. Whichever view is taken, the jury could say that he was not a volunteer or a trespasser, but lawfully was assisting the engineer, and, being where he had a right to be, the plaintiff is not required before he can recover to prove any contractual relation between himself and the defendant. *Stewart* v. *Harvard College*, 12 Allen, 58, 67. *Hall* v. *Bates*, 216 Mass. 140, 142.

It is further pressed in argument, that as matter of law the acts of the defendant's servants or agents in undertaking to raise the tug were unauthorized and exceeded the scope of their employment. This question however was for the jury who could find that when the tug reached the defendant's lighter the captain went aboard, saw the engineer and "man in charge whose name was Campbell," and told him that the superintendent of the dredging company "had sent him over there . . . for Campbell to hoist . . . the tugboat's stern out and get the line out of the wheel. . . ." And on the evidence of the defendant's vice-president and general manager, that his company had a running account with the dredging company, and that when he first saw the tug he was engaged on other work "some four or five hundred feet away. . . . That what first attracted his attention was that they called to us and said they had a line on the wheel, and wanted us to take it out," to which the witness replied "that he would as soon as he got through with this job, and said nothing more at that time," the

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jury further could find that the general manager knew the tug was at the lighter to have the line taken out, and did not refuse to render the services desired "as soon as he got through with this job," but gave no orders to the engineer of the lighter to await his return. It also appeared and could be found that when some two and one half hours later the manager "looked out the back room from his office, . . . and saw the stern half way up in the air, . . . he rushed down, and asked the engineer what . . . he was doing. . . . Don't you know better than this?" But even then the manager, although he saw the men, including the plaintiff, "under the stern," gave no warning to the plaintiff of his peril, or directed the tug which fell about ten or fifteen minutes after he got there to be lowered. It is true that in explanation of his conduct the general manager testified, "if the engineer had not been astraddle of the shaft and Collins under the stern, I should have told the engineer of the lighter to immediately have lowered that boat down, but if I had done so it would have hurt them the same as they were." But the sufficiency of this excuse when he could have warned the plaintiff as well as the engineer of the tug, to move from under the stern, and then have lowered the tug, was for the jury. The testimony of Campbell also was before them, that "he was on the lighter on duty . . . staying there all day, doing all around or ordinary work," and that the general manager "did not tell him to do any work for the company that came along unless he got orders," and that while no orders were given that day "the witness was not supposed to turn away business of the company, but it was not his duty to take it unless he got orders." If all the foregoing evidence is viewed in connection with the further undisputed facts, that the defendant rendered a bill to the dredging company for the services of the general manager, and of its employees, and for the use of the lighter, which has been paid, the jury would be justified in finding that at the time of the accident the defendant had undertaken the work.

It also could be found that if originally Campbell exceeded his authority, his acts were ratified. *Hall* v. *Bates*, 216 Mass. 140, and cases cited. *White* v. *Apsley Rubber Co.* 194 Mass. 97, 99, 100. *Dempsey* v. *Chambers*, 154 Mass. 330, 332, 333.

Nor should the defendant acting with full knowledge of all the circumstances be permitted to demand and receive the benefit of

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the transaction, and then turn around and repudiate its liability. *Hanley* v. *Boston Elevated Railway*, 201 Mass. 55, 57.

The final inquiry, whether there was any evidence of the defendant's negligence, may be disposed of shortly. The jury on ample proof could determine that the hook attached to the block of the tackle holding the sling which had been passed under the stern was so worn, chafed and frayed, that when subjected to the necessary strain it gave way, and that this condition could have been ascertained and remedied by the exercise of reasonable diligence on the part of the defendant's agents and servants. *Hall* v. *Henry Thayer & Co.* 225 Mass. 151, and cases cited.

The defendant, having failed to show any reversible error in the refusal of the first request or of the remaining requests, including the seventh and eight, on which it specially relies, we come to the last exception which rests on the denial of its motion for a new trial, because after the evidence was closed one of the jurors took a private view of the wharf. If on his own initiative a juror takes a view, thus obtaining evidence outside of the evidence introduced in the court room, his conduct does not as matter of law require the trial judge to set the verdict aside. *Chemical Electric Light & Power Co.* v. *Howard*, 150 Mass. 495. *Commonwealth* v. *McCauley*, 156 Mass. 49. *Harrington* v. *Worcester, Leicester, & Spencer Street Railway*, 157 Mass. 579, 582, 583. As was said by Lathrop, J., in *Harrington* v. *Worcester Leicester & Spencer Street Railway, ubi supra*, "It is undoubtedly within the power of the presiding judge in such a case to refuse to grant a new trial, if he is satisfied that the interests of justice do not require that the verdict should be set aside; as, for example, if the conduct of the juror in no way tends to prejudice the party against whom the verdict is rendered." The record in the present case recites that, after the motion was heard, the trial judge, accompanied by counsel for the respective parties, took a view of the premises, and on the testimony of the juror the judge could find that no harm to the defendant had resulted. The finding having been warranted, it is conclusive, and no error of law appears. *Commonwealth* v. *Desmond*, 141 Mass. 200, 202.

The remaining question is whether on the record in the first case a verdict should have been ordered for the defendant Splane.

The jury could find that the captain had authority to hire men

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if in his judgment they were needed, subject however to the approval of the defendant, and that after the accident, and upon being informed of the employment of the plaintiff, he ratified or confirmed what had been done. If the plaintiff was an employee, the captain and engineer of the tug whom he was to assist were fellow servants, and the defendant cannot be held responsible for the alleged negligence of the captain. *Rogers* v. *Ludlow Manuf. Co.* 144 Mass. 198, 203, and cases cited.

If, however, it be assumed that the plaintiff is right in his contention that the plaintiff was not a fellow servant but an independent contractor, there is no evidence of the exercise of any supervision or control over him by the captain. The engineer with his tools was taken aboard and placed by the plaintiff under the stern of the tug when raised sufficiently, where he was to remain with his boat until the rope had been removed from the wheel. The captain, who stood on the lighter for the sole purpose of informing the engineer of the lighter company, when the stern of the tug had been sufficiently elevated, did nothing more than to observe whether the plaintiff did what the contract required. The relation between the parties was that of contractor and contractee. *Conners* v. *Hennessey*, 112 Mass. 96. *Morrissey* v. *Boston & Maine Railroad, ante*, 171. The case is not within *Carleton* v. *Franconia Iron & Steel Co.* 99 Mass. 216, which held that the owner or occupant of land is liable in damages to those coming upon it using due care, at his invitation, or to transact business with him, for injuries occasioned by the unsafe condition of the premises which is known to him, or in the exercise of reasonable diligence should have been known to him, and of which he has given them no notice. The premises were not the premises of the defendant, or in his occupation or control, but the lighter and entire hoisting apparatus was owned, controlled and operated by the lighter company which had undertaken to perform the work.

We are unable under the circumstances to perceive the violation of any duty owed to the plaintiff, and the defendant's motion for a directed verdict should have been granted. *Davis* v. *John L. Whiting & Son Co.* 201 Mass. 91, 93.

The result is that in the first case, judgment for the defendant is to be entered, while in the second case the exceptions are overruled.

So ordered.

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THOMAS McCORMICK *vs.* COMMERCIAL BREWING COMPANY.

Suffolk. March 26, 1918. — May 24, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Equity Pleading and Practice, Exceptions, Findings of judge. *Corporation*, Officers and agents.

In a suit in equity against a corporation for five years' salary as "supervisor" alleged to be due to the plaintiff in accordance with a vote of the directors of the defendant, a material issue was, whether there was an agreement between the plaintiff, who was a director, and the other directors, when the vote was passed five years before, that it should be passed merely to give the plaintiff a standing in a controversy then going on within the corporation, that it was merely a matter of form, and that it should not be binding upon the corporation. There was conflicting evidence upon this issue. The defendant also contended that the vote was beyond the power of the directors and that it was a fraud upon the stockholders. The judge who heard the case filed a memorandum containing a ruling that the directors had no power to pass such a vote, a finding that the motive for the vote was to induce the plaintiff to bring certain business to the defendant, that the vote was secret and was concealed from many stockholders and directors and was fraudulent, and this further finding: "Witnesses equal in character and apparently worthy of belief contradict the evidence as to the intention of the vote as testified to by the plaintiff. I believe their testimony in view of the subsequent conduct of the plaintiff." *Held*, that this was a finding to the effect that the vote of the directors was passed with an agreement between them and the plaintiff that it should not be binding upon the defendant; and therefore that the suit must be dismissed.

The ruling of the judge that the directors had no power to pass the vote in question was held to have been erroneous; but it *also was held* that, in view of the judge's finding, the error was immaterial.

The question, whether the further findings of the judge as to the secret and fraudulent character of the vote were warranted, also was *held* in view of the finding above described, to have been immaterial.

BILL IN EQUITY, filed in the Superior Court on January 16, 1917, in which the plaintiff averred that the defendant owed him the sum of $49,000 on account of salary; that in a suit in equity of the defendant against him a decree had been entered against him for $14,788 (see 225 Mass. 504); that the defendant did not have assets sufficient to pay its liabilities, and that the plaintiff feared that, if the sum ordered to be paid by the plaintiff to the defendant under the bill in equity above mentioned were paid to the de-

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fendant it would pay such sum in full to persons other than the plaintiff and thereby would reduce the sum which the plaintiff might obtain from the defendant upon the claim set up in this suit. The prayers of the bill were that the defendant be enjoined from prosecuting further its suit in equity against him, that the amount owed to the plaintiff by the defendant be established and its payment ordered, and that there be applied on account thereof the amount which the plaintiff was ordered to pay to the defendant in the previous suit.

The suit was heard by *Hardy*, J. The material evidence at the trial and the findings of the judge are described in the opinion. At the close of the evidence, the plaintiff asked for and the judge refused to give the following rulings:

"1. The directors had the power to appoint a supervisor.

"2. The directors had power to fix the salary of a supervisor."

"7. There is no evidence of any fraudulent purpose on the part of the directors in connection with the vote of May 20, 1908.

"8. There is no evidence that the vote of May 20, 1908, was in any way concealed from the stockholders."

"10. The votes at the annual meeting of the stockholders in May, 1913, relating to the salary of McCormick had no effect on the validity of the vote of directors of May 20, 1908, or on the salary earned prior to said annual meeting."

The judge ordered a decree dismissing the bill. The plaintiff alleged exceptions, which, after the death of *Hardy*, J., were allowed by *J. F. Brown*, J.

F. L. Norton, for the plaintiff.

J. A. Curtin, (*A. S. Allen & H. V. Cunningham* with him,) for the defendant.

CROSBY, J. This is a bill in equity filed in the Superior Court, and is before this court on the plaintiff's exceptions. The presiding judge filed a memorandum which is made a part of the exceptions, and ordered the bill dismissed with costs.

The defendant corporation was organized in 1907 to succeed another corporation known as the Puritan Brewing Company. The plaintiff was the treasurer and a director of the Puritan Brewing Company and he became the treasurer and a director of the defendant corporation at the time of its organization, and remained so until February 12, 1908, when be resigned as treasurer; on May 20, 1908,

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he was re-elected and thereafter, on the same day, a vote was passed by the directors that he be engaged as supervisor and paid a salary at the rate of $10,000 a year. He seeks to recover $50,000 for such salary which he claims to be due from May 20, 1908, to May 20, 1913, less $1,000 credited on account on June 21, 1913.

On June 26, 1913, the plaintiff resigned as treasurer and thereafter ceased to take any active part in the business of the defendant. Before this time and when the salary vote was passed, there existed a prolonged and acrimonious controversy among the stockholders, in which the plaintiff participated, over the control of the corporation; and an important issue at the trial was, whether the vote was passed to enable the defendant to pay the plaintiff for services rendered or was designed merely to give him a standing in the controversy in which he was engaged with certain of the stockholders, and with the understanding and agreement between him and the directors that the salary so voted was merely a matter of form and that the vote was not to be valid and binding upon the parties. The plaintiff denied that there was any such agreement and contended and offered evidence that it was a genuine vote and was adopted to compensate him for important and valuable services to be rendered by him to the defendant.

On the other hand, it is the contention of the defendant that it was understood by the directors and the plaintiff that the salary so voted should not be paid, and certain of the directors, including one Doherty (a director who was present at the meeting of the board held on May 20, 1908, when the vote was passed), testified to that effect. Doherty testified that before the meeting the "plaintiff called the witness into the business office and handed him a slip of paper with the vote on it and said, 'I want the company to express their confidence in me, because if I have to go into court with these blackguards I want to show them that the company is willing to pay me ten thousand dollars ($10,000) a year, but I will never take a cent of it, because the company is in such financial condition they could n't pay me anyhow, and I simply want it put on there for court purposes only.' The witness told the plaintiff that if the plaintiff would repeat that to the board, the witness would offer the vote. The plaintiff did so and the vote was passed without discussion. All had absolute confidence in the plaintiff. The witness first learned that the plaintiff was

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going to collect on the salary about six (6) or eight (8) months after plaintiff left in 1913. The plaintiff never made a claim for money on account of salary to the knowledge of the witness between 1908 and 1913."

There was evidence that there was no need for the appointment of a supervisor and that the services rendered by the plaintiff were no greater than as treasurer of the corporation he would properly be expected to perform; also, that the plaintiff controlled certain trade which purchased the defendant's products and which he had on previous occasions taken away from the defendant.

In the memorandum filed by the presiding judge he made among other findings of fact the following: "I am of opinion that the directors had no right or power to pass such a vote under the by-laws in the absence of authority from the stockholders, and so rule. I am satisfied from the evidence of the meagre discussion that was had at the meeting and before the same, about the intended action, that the motive of the vote was to induce McCormick to bring back to the defendant company the trade he controlled as a consumer which he had previously diverted. As I find that other stockholders and directors had dealings with the company of a similar character as consumers, and as this vote was secret in character and concealed from many of the stockholders and directors, I find the vote was fraudulent in its intention so far as it was in effect a premium to be given to McCormick for his future purchases of the product of the defendant. Witnesses equal in character and apparently worthy of belief contradict the evidence as to the intention of the vote as testified to by the plaintiff. I believe their testimony in view of the subsequent conduct of the plaintiff. I find he made no claim for payment of such salary for several years; that because of the action of the auditor, as a matter of proper bookkeeping, it was first referred to in a report of the treasurer in 1912 and was then indefinite as to the salary of the treasurer unpaid, giving no definite amount. When it was found and understood by the directors and stockholders that such claim was made, it was repudiated. I find as a fact that during the five years the plaintiff apparently performed no greater services than any treasurer would be expected to perform."

The plaintiff concedes that there was evidence which warranted

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a finding that the vote to pay the plaintiff a salary "was never intended to be valid and binding upon the parties, and that the directors intended it as a mere form for use against a few dissatisfied stockholders who had brought a bill in equity against the defendant and the plaintiff seeking to compel the plaintiff to pay the defendant money, hereinafter called the Kenney suit." He concedes that if such a finding had been made by the judge, his exceptions would be immaterial. But he strenuously contends that no such finding was made. That the other findings, including the finding that the vote was secret in character and concealed from many of the stockholders and directors and fraudulent "so far as it was in effect a premium to be given to McCormick for his future purchases of the product of the defendant," were not warranted by the evidence; and he argues, that "this finding includes by necessary inference a finding that the directors intended the vote to be binding and the salary paid, because if not paid, it could not be a premium to the plaintiff for his future purchases."

We cannot agree with this reasoning, and are of opinion that it is based upon a misconception of the findings recited in the memorandum. The judge finds that the motive of the vote was to induce the plaintiff to bring back to the defendant company the trade which he had previously diverted. In other words, the directors passed the vote to induce the plaintiff to bring trade to the defendant. Whatever motive actuated the directors in passing the vote, the question remains whether any salary was intended to be paid under it. Upon this question the court has expressly found that he believed the witnesses for the defendant, some of whom testified in substance that it was not thereby intended that any salary should be paid under it, but that it was expressly agreed between the plaintiff and the directors that it was adopted as a mere form without any validity or binding force. Plainly this finding is decisive and must be held to finally determine the rights of the parties.

We are of the opinion that, under the by-laws, it was within the power of the directors, if they acted in good faith, to appoint a supervisor and fix his salary without the approval of the stockholders and that the ruling of the judge to the contrary was error, *Fillebrown* v. *Hayward*, 190 Mass. 472; but in view of the finding

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that the vote was not intended to be effective, the ruling is immaterial. For the same reason the finding that the vote "was secret in character and concealed from many of the stockholders and directors, . . . was fraudulent in its intention so far as it was in effect a premium to be given to McCormick for his future purchases of the product of the defendant," and the refusal to give the rulings requested, have become immaterial. The exception to the exclusion of evidence offered to show that the credit of the defendant was affected after the plaintiff ceased active management of the business, also is immaterial in view of the finding above referred to.

It follows that the exceptions must be overruled and a decree is to be entered in the Superior Court dismissing the bill with costs.

Ordered accordingly.

MICHAEL A. O'NEIL, administrator, *vs.* FRED F. SQUIRE & others, trustees.

MICHAEL A. O'NEIL *vs.* SAME.

Suffolk. March 26, 27, 1918. — May 24, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Snow and Ice. Notice. Executor and Administrator. Negligence, Of one controlling real estate, Causing death. *Death. Attorney at Law.*

Where a person is injured by ice falling upon him due to a defective condition of a building and dies within six days without notice thereof having been given in accordance with Sts. 1908, c. 305; 1913, c. 324, in his behalf to the person responsible for the condition of the premises resulting in the injury, a notice given five days after the death of the person so injured by an attorney at law acting on behalf of one who more than a month later was appointed administrator of the estate of the person so injured does not satisfy the requirements of the statute, even if the attorney's act is ratified by the administrator after his appointment; because the right of the administrator to give notice is not vested in him until he is appointed.

TWO ACTIONS OF TORT, the first to recover for the conscious suffering and death of Mary A. O'Neil, the plaintiff's intestate, caused by her being struck on February 27, 1914, by a piece of ice which fell upon her from the defendants' building numbered 37 and 39 North Street in Boston, as she was a traveller on the

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adjoining highway; and the second by the husband of the intestate for consequential damages. Writs dated June 5, 1914.

The actions were tried together in the Superior Court before *Stevens*, J. In answer to special questions, the jury assessed the damages in the first action at $5,900, and in the second action at $315. The judge thereupon ordered verdicts for the defendants, ruling that the notice given to the defendants, as described in the opinion, was insufficient, and reported the actions to this court for determination of the correctness of that ruling, judgment to be entered in accordance with the findings of the jury if the ruling was incorrect; otherwise, judgment to be entered on the verdicts for the defendants.

St. 1908, c. 305, as amended by St. 1913, c. 324, is as follows:

"The provisions of sections twenty, twenty-one and twenty-two of chapter fifty-one of the Revised Laws, in so far as they relate to notices of injuries resulting from snow or ice, shall apply to actions against persons or corporations founded upon the defective condition of the premises of such persons or corporations, or of an adjoining way, whenever such defective condition is caused by, or consists in part of, snow or ice. Leaving the notice with the occupant of said premises, or, in case there is no occupant, posting the same in a conspicuous place thereon, shall be a sufficient compliance with the foregoing provisions: Provided, however, that notice within thirty days after the injury shall be sufficient; and if by reason of physical or mental incapacity it is impossible for the injured person to give the notice within thirty days after the injury, he may give it within thirty days after such incapacity has been removed, and in case of his death without having been for thirty days at any time after his injury of sufficient capacity to give the notice, his executor or administrator may give the notice within thirty days after his appointment. No notice shall be held to be invalid by reason of any inaccuracy or misstatement of the owner's name if it appears that the same was made in good faith and did not prevent or unreasonably delay the owner from receiving actual notice of the injury and of the claim that it occurred from a defective condition of his premises."

E. H. Ruby, (*S. T. Crawford* with him,) for the plaintiff.

L. A. Ford, for the defendants.

BRALEY, J. These actions are in tort to recover expenses in-

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curred by her husband, and for the conscious suffering and death of the intestate caused by a piece of ice falling upon her from the roof of the defendants' building abutting on a public way where she was passing as a pedestrian, and while she was in the exercise of due care.

It is conceded that the defendants had actual notice of the time, place and cause of the accident, but by St. 1908, c. 305, as amended by St. 1913, c. 324, the provisions of R. L. c. 51, §§ 20–22 are made applicable to an action for personal injuries caused by snow or ice under the circumstances described. It is provided by § 20: "A person so injured shall, within ten days thereafter, if such defect or want of repair is caused by or consists in part of snow or ice, or both, and in all other cases, within thirty days thereafter, give to the county, city, town or person by law obliged to keep said way, causeway or bridge in repair, notice of the time, place and cause of the said injury or damage; and if the said county, city, town or person does not pay the amount thereof, he may within two years after the date of said injury or damage recover the same in an action of tort. Such notice shall not be invalid or insufficient solely by reason of any inaccuracy in stating the time, place or cause of the injury, if it is shown that there was no intention to mislead and that the party entitled to notice was not in fact misled thereby." And by § 21: "Such notice shall be in writing, signed by the person injured or by some one in his behalf, and may be given, in the case of a county, to one of the county commissioners or the county treasurer; in the case of a city, to the mayor, the city clerk or treasurer; and in the case of a town, to one of the selectmen or to the town clerk or treasurer. If by reason of physical or mental incapacity it is impossible for the person injured to give the notice within the time required, he may give it within ten days after such incapacity has been removed, and in case of his death without having been for ten days at any time after his injury of sufficient capacity to give the notice, his executor or administrator may give the notice within thirty days after his appointment."

The giving of a notice in writing is thus made a condition precedent to the maintenance of the action. *Baird* v. *Baptist Society*, 208 Mass. 29. The accident happened on February 27, 1914, in consequence of which the intestate died on March 5, 1914. The

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only notice in writing is dated March 10, 1914. It is signed by counsel purporting to act at the request of the husband of the intestate who on April 24, 1914, was duly appointed administrator of her estate.

It was held in *Taylor* v. *Woburn*, 130 Mass. 494, under St. 1877, c. 234, § 3, then in force but which contained no provisions as to notice by the administrator or executor, or for any extention of time within which notice should be given where death ensued, that a notice given by the father of the death of his son caused by a defect in the highway was sufficient. The son being dead and incapable of acting, the father "had the right of administration upon his estate, which might be subsequently exercised; and, in anticipation of such administration, he had authority to do what was necessary to preserve his estate and his right of property." The St. of 1877, c. 234, was amended by St. 1881, c. 236, in which express provisions first appear, that in the event of the death of a person injured without notice being given it may be given by an administrator or executor, and the construction of the statute as amended was considered in *Nash* v. *South Hadley*, 145 Mass. 105, where the decedent survived for more than ten days, but gave no notice. The executor, however, named in the decedent's will gave notice within thirty days after the testator's death, but before he received his appointment. The question for decision was whether notice had been given as required by the statute as amended. The court held that the notice was a nullity. "The construction by which it was held in *Taylor* v. *Woburn* that 'the statute authority for another to act for the person interested, and the clear purpose manifested thus to act in behalf of his deceased son,' on the part of the father, authorized the decision that a notice given after the decease of the son, by the father, within thirty days after the injury, was sufficient, is not permissible after the Legislature has provided by whom and under what circumstances a notice shall be given when the party injured has died. The rule thus prescribed is the only one to be followed." And it has been followed in actions against cities and towns. *Stoliker* v. *Boston*, 204 Mass. 522, 539, 540. *Carberry* v. *Sharon*, 166 Mass. 32.

The St. 1887, c. 270, commonly referred to as the employers' liability act, contains similar provisions requiring notice to the employer of the time, place and cause of the injury to, or death

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of the employee. In *Gustafsen* v. *Washburn & Moen Manuf. Co.* 153 Mass. 468, the employee's death was instantaneous, and upon the ground that St. 1887, c. 270, made a distinction "between a case of personal injury and a case of death, by which is meant instantaneous death" it was decided that "When the death is instantaneous, notice cannot be given by the person injured, and must be given, if at all, by some one else." It was said "that the statutory provision that the executor or administrator may give notice was not intended to apply to a case of instantaneous death, where the executor and administrator had no interest in the action to be brought, and no duty in regard to it," and that under *Taylor* v. *Woburn, ubi supra,* notice signed by the widow "was signed by a person authorized to give notice." While St. 1888, c. 155, amended St. 1887, c. 270, by providing that in case of the death of an employee "without having given the notice and without having been for ten days at any time after his injury of sufficient capacity to give the notice, his executor or administrator may give such notice within thirty days after his appointment," *Gustafsen* v. *Washburn & Moen Manuf. Co.* was followed in *Daly* v. *New Jersey Steel & Iron Co.* 155 Mass. 1, where the death again having been instantaneous notice given by the widow was deemed to be sufficient. The court however takes care to say that although the plaintiff's case literally fell within this provision, yet "If in case of an instantaneous death it is held that the notice must necessarily be given within thirty days from the occurrence of the accident, we fear that the statute would prove misleading, and that widows and next of kin might omit to give seasonable notice in the supposition that notice by an executor or administrator is called for." It is to be noticed that this case as well as the Gustafsen case rests on the ground that where death is instantaneous notice could be given by the widow of the deceased employee, or since the amendment, it may be given by her or by an executor or administrator. But if death is not instantaneous, the authority of *Nash* v. *South Hadley, ubi supra,* must be considered as controlling. It was so decided in *Lukkonen* v. *Fore River Ship Building Co.* 197 Mass. 586, where the court took occasion to say that the doctrine of the Gustafsen case, because of the St. of 1887, c. 270, should not be extended.

The argument of the plaintiff in the present case is substantially

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similar to, if not on all fours with the argument considered in the Lukkonen case, the answer to which is stated in the opinion in these words: "It is argued, however, by the plaintiff, that the person who gave the notice was at that time the attorney for the present plaintiff, the person who afterward became the administratrix, and that his act was ratified by the plaintiff after she became administratrix. In view of the express language of the statute, that position does not seem to us tenable. It seems more in accordance with the spirit and language of the statute to interpret it as meaning that the right of the administrator to give the notice is not vested in him until he is appointed. In any point of view, therefore, the notice must be held to be insufficient."

We find no sufficient reason on the present record for any modification or extension and the result is, that the right of the administrator to give the requisite notice not having vested until his appointment, the statute has not been complied with and the order in each case must be

Judgment for the defendant.

GEORGE HEUSER *vs.* TILESTON AND HOLLINGSWORTH COMPANY.

Suffolk. March 27, 1918. — May 24, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Evidence, Presumptions and burden of proof, Inferences, Remoteness. *Negligence*, In wrecking work. *Practice, Civil*, Requests, rulings and instructions.

While the employees of a wrecking company were engaged in tearing out brick work around upright boilers in a mill and workmen of the owner of the mill were cutting off the tubes inside the boilers with chisels and taking down the boilers, one of the company's employees was injured by being struck on the head by a falling chisel. The owner's workmen alone were using chisels on the day of the accident. The boilers were thirty feet high and thirty inches apart, and between the tops of the two boilers near which the injured employee was at work a plank was laid. A chisel had been seen with one part "lapped over from the edge of the boiler to the plank." There was some vibration of the boilers caused by the cutting of the tubes. At the time of the accident the plank fell. About the time of the accident a workman of the mill owner, carrying two chisels which had been sharpened, went up a ladder to enter the top of a boiler at the bottom of which the employee afterwards injured was working. In an action by the injured employee of the company against the mill owner for the injuries so received,

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upon evidence at the trial tending to prove the foregoing facts, it was *held*, that findings were warranted, either that a chisel left upon the plank fell with it and struck the plaintiff, or that the workman of the owner as he ascended the ladder dropped a chisel upon the plaintiff; that, whichever was the cause determined upon by the jury, a further finding was warranted that the plaintiff's injuries were due to negligence for which the defendant might be found to be responsible.

A finding of the jury for the plaintiff at the trial of the action above described could not be said as a matter of law to be based upon conjecture, but was warranted by reasonable inferences from facts which might have been found to exist.

Where a company under contract with a mill owner is tearing away brick work around upright boilers while workmen of the mill owner are taking down the boilers, the mill owner owes to the employees of the company the same duty not to injure them that he owes to his own workmen.

Testimony, at the trial of the action above described, that a day or two before the accident a workman of the defendant was seen to come up half way through the manhole in the top of the boiler, pick up something and go back again, was admissible as having some tendency to show that something was on the plank and, in connection with other testimony of the same witness that he had seen tools on the plank, such testimony warranted an inference that the plank was used by workmen of the defendant to place tools upon.

TORT for personal injuries alleged to have been received, while the plaintiff, an employee of the Jarvis Engineering Company, was at work on premises of the defendant, by reason of negligence of employees of the defendant in causing a chisel to fall upon him. Writ dated September 15, 1916.

In the Superior Court the action was tried before *Sanderson*, J. The material evidence is described in the opinion. At the close of the evidence, the defendant moved that a verdict be ordered in its favor and asked for rulings which, with the disposition made of them by the presiding judge, were as follows:

"1. The defendant as owner of the premises in question, owed to the plaintiff and the other employees of the Jarvis Engineering Company at the most only the same duty that the defendant owed to his own employees." This ruling the judge gave in the following form: "1. The defendant, as owner of the premises in question, owed to the plaintiff and the other employees of the Jarvis Engineering Company, as to the condition of its premises, the same duty that the defendant owed its own employees."

"2. If all the conditions surrounding the plaintiff were plainly to be seen if he looked, no duty was owed to the plaintiff by the defendant in any way to change the premises, nor any duty to warn or instruct the plaintiff." This ruling the judge gave in the

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following form: "2. If all the conditions surrounding the plaintiff were plainly to be seen if he looked, no duty was owed to the plaintiff by the defendant in any way to change the premises, nor any duty to warn or instruct the plaintiff as to those conditions."

The jury found, in answer to a special question, that the plaintiff was injured by being hit by a chisel and not by a plank; and found for the plaintiff in the sum of $1,200. The defendant alleged exceptions.

E. C. Stone, for the defendant.

W. R. Bigelow, for the plaintiff.

CROSBY, J. The plaintiff was injured by a chisel which fell striking him on his head. The undisputed facts show that the plaintiff was an employee of the Jarvis Engineering Company which was engaged in wrecking some upright boilers at the defendant's mill by tearing out the brick work around them, while at the same time the defendant's employees were removing the tubes and taking down the boilers; the tubes were disconnected from the boilers by cutting them with steel chisels, and the men doing this work entered the boilers by openings in the tops which were reached by a ladder. The boilers were about thirty feet in height and about thirty inches apart. At the time of the accident some of the defendant's workmen were inside one of the boilers cutting the tubes, and the plaintiff was removing the brick wall near the ground beneath where the defendant's employees were at work. There was evidence that a plank was laid across the tops of two of the boilers and that in cutting the tubes there was more or less vibration; that about the time of the accident one O'Riordan, an employee of the defendant, went up the ladder carrying two chisels which had been sharpened. A witness called by the plaintiff testified that he had seen tools on the plank; that just before the accident he heard the ring of a chisel and saw the plaintiff fall although he did not see anything strike him; "that he had seen the chisel before at the top of the boiler, and when he saw it, it was halfways on the plank and halfways on the boiler, — that is, one part of the chisel lapped over from the edge of the boiler to the plank right at the drum-head." A chisel was found near where the plaintiff was struck and there was evidence that similar chisels were being used by the defendant's employees at that time. It appeared that while chisels also were used by the

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employees of the Jarvis Engineering Company in removing the brick wall, none were in use on the day of the accident or the day before, and that the plank fell at the same time as the chisel which struck the plaintiff. The testimony tended to show that he was rightfully at work on the premises and was in the exercise of due care; and that during the time in question the defendant's employees were the only workmen using chisels. Upon this evidence, it could have been found that the chisel which struck the plaintiff was either dropped by O'Riordan as he was carrying it up the ladder, or that it had been left upon the plank by an employee of the defendant, and that the plank and chisel were caused to fall by the vibration due to cutting the tubes; and although no one saw the chisel fall, it would seem that these are the only reasonable explanations of the accident.

If it happened in either way, it could have been found to be due to the negligence of the defendant's employees who were not fellow servants of the plaintiff. Under such circumstances the defendant owed to the plaintiff the same duty not carelessly to injure him that it owed to its own employees. *Pettingill* v. *William Porter & Son, Inc.* 219 Mass. 347, and cases cited. The finding of the jury cannot be said to have been based upon conjecture. Reasonable inferences could have been drawn from facts found to exist which would support the verdict. As was said in *Melvin* v. *Pennsylvania Steel Co.* 180 Mass. 196 at page 202, "The plaintiff was not bound to show the particulars of the defendant's negligence. It was enough if he showed facts from which negligence properly might be inferred. *Mooney* v. *Connecticut River Lumber Co.* 154 Mass. 407, 409. In the absence of any evidence from the defendant to explain the facts relied on, the jury well might find for the plaintiff." The facts there are similar in many respects to those in the case at bar, and that case is decisive. *Lowner* v. *New York, New Haven, & Hartford Railroad,* 175 Mass. 166. *Woodall* v. *Boston Elevated Railway,* 192 Mass. 308. *Davis* v. *Boston Elevated Railway,* 222 Mass. 475.

The exceptions to the testimony of the witness Packard, that within a day or two before the accident he had seen O'Riordan come up half way through the manhole and pick up something and go back again, cannot be sustained. This testimony had some tendency to show that something was on the plank, and in con-

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nection with the testimony of the same witness that he had seen tools on it, it could have been inferred that the plank was used for that purpose.

The exception of the defendant to the refusal of the presiding judge to give its first and second requests for instructions in the exact language presented, must be overruled. The instructions given were substantially as requested, and were accurate.

Exceptions overruled.

WILLIAM E. BLUNT & another, executors, *vs.* MARTIN TAYLOR & others.

Essex. February 7, 1918. — May 25, 1918.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Trust, Void for indefiniteness. *Devise and Legacy*, Validity.

A will contained the following residuary clause: "All the remainder of my estate . . . I give, bequeath and devise to my executors and trustees, in whose honesty and discretion I have reposed especial trust and confidence, for certain purposes which I have made known to them. And I hereby authorize and empower my said executors to make such distribution and division of my estate as I have indicated to them, and as they shall deem proper for the fulfillment of my wishes so well known to them relying entirely upon their judgment in the premises." *Held*, that the residue was not given to the executors absolutely, but that a trust was attempted to be created, which was not for a charitable purpose and was wholly undefined, so that no valid gift was made and the residue was to be treated as intestate property.

BILL IN EQUITY, filed in the Probate Court for the county of Essex on November 21, 1916, by the executors of the will of Thomas J. Taylor, late of Haverhill, for instructions in regard to the proper distribution of the testator's estate to be made under the ninth and residuary clause of his will, which is quoted in full in the opinion.

The Probate Court made the following decree: "That it was not the intention of said testator to give a beneficial interest in the property disposed of under said ninth clause of said will to the petitioners; but that he intended that they should receive said property upon a trust which the court finds is not sufficiently

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defined to be carried into effect. The petitioners received said property therefore under a resulting trust for Matthew H. Taylor, Martin Taylor and Louisa J. Foster, the heirs at law and next of kin of said testator, and the petitioners should make distribution thereof among said persons or their legal representatives in the same proportions in which they would have been entitled to intestate property of the testator."

William E. Blunt, and H. Clinton Taylor, who were named as executors in the will, appealed from the decree.

The case came on to be heard by *Crosby*, J., who at the request of the parties reserved it upon the record for determination by the full court.

The case was submitted on briefs.

S. E. Wardwell & C. A. Wardwell, for the executors.

R. C. Pingree, for the defendants Martin Taylor and others.

F. H. Tilton, C. E. Sawyer & W. G. Cogswell, for the defendants Herbert P. Coffin and others.

W. E. Rowell & P. R. Clay, for the defendant Paul R. Clay.

CARROLL, J. By the ninth clause of his will, Thomas J. Taylor disposed of the residue of his estate in these words: "All the remainder of my estate both real and personal of which I may die seized and possessed, and to which I may in any way be entitled at the time of my decease, I give, bequeath and devise to my executors and trustees, in whose honesty and discretion I have reposed especial trust and confidence, for certain purposes which I have made known to them. And I hereby authorize and empower my said executors to make such distribution and division of my estate as I have indicated to them, and as they shall deem proper for the fulfillment of my wishes so well known to them, relying entirely upon their judgment in the premises." The executors contend that no trust was created by this clause, that there was an absolute gift of the residue to them. In the Probate Court it was held that the executors received the property upon a trust which was too indefinite to be carried into effect, and that a trust resulted for the heirs at law and next of kin of the testator; from this decree the executors appealed.

If the words expressing trust and confidence in the honesty and discretion of the trustees and executors, and reliance "upon their judgment in the premises," were omitted from the residuary

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clause, it probably would be undisputed that the testator did not intend an absolute gift to the trustees and executors, but to create a trust of the residue of his estate to be disposed of, they being authorized and empowered "to make such distribution and division."

The words expressing trust and confidence in the executors and trustees did not show that the executors were to take the property absolutely as their own. These words are merely expressions of confidence that the trustees will carry out the trust and distribute the property and divide the estate according to the wishes of the testator — already "made known to them," — according to their best judgment. The gift was not to the petitioners by name, but was a gift to them as trustees and executors of the testator's will; and he clearly manifested his intention to give the estate to them for certain purposes, although they were to use their own best judgment in its distribution, and as they thought proper for the fulfilment of his wishes. *Davison* v. *Wyman*, 214 Mass. 192. *Minot* v. *Attorney General*, 189 Mass. 176 and cases cited. *Nichols* v. *Allen*, 130 Mass. 211.

In *Lloyd* v. *Lloyd*, 173 Mass. 97, there was an outright gift of the estate, and the words of recommendation, confidence and desire were not intended by the testator to cut down this absolute and unrestricted character of the gift. See *Durant* v. *Smith*, 159 Mass. 229; *Aldrich* v. *Aldrich*, 172 Mass. 101; *Pitts* v. *Milton*, 192 Mass. 88; *Poor* v. *Bradbury*, 196 Mass. 207.

Although a trust was attempted to be created by the will of the deceased, it was not a charitable trust, and, not being sufficiently definite, it cannot be executed. The judge of probate, therefore, was right in deciding that the residue should go to Matthew H. Taylor, Martin Taylor and Louisa J. Foster, "the heirs at law and next of kin of said testator, and the petitioners should make distribution thereof among said persons or their legal representatives in the same proportions in which they would have been entitled to intestate property of the testator." *Olliffe* v. *Wells*, 130 Mass. 221. *Wilcox* v. *Attorney General*, 207 Mass. 198. *Davison* v. *Wyman*, *supra*.

Decree of the Probate Court affirmed.

So ordered.

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ARTHUR D. ORDWAY *vs.* CITY OF NEWBURYPORT.

Essex. March 4, 1918. — May 25, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Inspection of Buildings. Municipal Corporations.

Under R. L. c. 104, § 22, providing that "No building which is designed to be used . . . as a . . . school house . . . shall be erected until a copy of the plans thereof has been deposited with the inspector of factories and public buildings for the district in which it is to be erected by the person causing its erection, or by the architect thereof," and § 55 of the same chapter, imposing a penalty for the violation of the provisions of § 22, a contractor engaged in the erection of a school house is not required to file a copy of the plans, and his failure to do so does not deprive him of any rights under the contract; and the issuing of a certificate of the inspector of factories and public buildings indorsed with the approval of the chief of the district police, which is mentioned in § 22, is not a condition precedent to recovery from the city by one who has supplied materials and labor for heating and ventilating the school house in accordance with his contract to do so.

In such an action on a contract for heating and ventilating the school house building the fact, that the plaintiff knew that the inspector had disapproved the plans submitted for heating the building, does not deprive him of his right to recover, if he has performed fully the work required by the plans and the specifications in his contract and if the disapproval of the inspector related wholly to a defect in the work done by the general contractor for the building of the school house.

CONTRACT by Arthur D. Ordway of Newburyport, doing business under the name of the Ordway Heating Company, against the city of Newburyport, to recover a balance of $1,125 alleged in the first count of the declaration to be due under a contract in writing between the plaintiff and the defendant for heating and ventilating a school house dated March 15 and May 25, 1911, and for a further sum of $469.75 alleged in the second count of the declaration to be due for labor and materials furnished by the plaintiff to the defendant. Writ dated December 5, 1913.

In the Superior Court the case was referred to an auditor, who filed a report in which he made the findings that are stated in the opinion and found that the plaintiff should recover from the defendant the sum of $1,594.75 with interest from September 15, 1913, the date of demand. Later the case was heard by *Quinn*, J., upon the auditor's report and other evidence which was intro-

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duced by the defendant. The judge found for the plaintiff and assessed damages in the sum of $1,372.50 on the first count and in the sum of $573.09 on the second count. The defendant alleged exceptions.

A. Withington, for the defendant.

E. B. Bishop, for the plaintiff.

CARROLL, J. In August, 1910, the plaintiff was awarded the contract for heating, by the hot air system, and ventilating a school house in the city of Newburyport. The following September a contract was made with one Morrison for the erection of the building, under which he was to furnish material and labor and do all the work except "heating, plumbing and painting." In November the system of heating was changed from hot air to steam.

The plans for the building were filed as required by R. L. c. 104, § 22, sometime before February 4, 1911, and on that day a State inspector of public buildings wrote to the architect in charge, disapproving certain parts of the plans. The certificate mentioned in the statute never was issued.

The contract between the plaintiff and the defendant, by which the plaintiff was to furnish all material and labor for the installation and completion of the heating and ventilating of the building, was executed May 25, 1911, bearing date of March 15, 1911, on which date Morrison was proceeding with the work and the school house "was up somewhat above the first floor." The building of the vent and heat ducts was a part of Morrison's contract. The ducts constructed by him, while apparently suitable for a system of heating by furnace, were not suitable in connection with a steam heating system. The auditor found that Morrison was requested to build ducts proper for a steam heating system, and refused.

The plaintiff contracted with the Walworth-English-Flett Company to perform the work required to be done by him, with certain exceptions. All this work was completed in substantial compliance with the agreement, and it was found that the system for heating and ventilating furnished by the plaintiff conformed to all the rules of the district police; that the system was capable of furnishing a uniform heat of the degree called for by the specifications, and that the difficulty in ventilation was due solely to the insufficiency and defective construction of the ducts built by

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Morrison. There was a finding for the plaintiff and the defendant excepted.

The statute (R. L. c. 104, § 22,) prohibits the erection of a "building which is designed to be used, in whole or in part, as a public building, public or private institution, school house . . . until a copy of the plans thereof has been deposited with the inspector of factories and public buildings . . . by the person causing its erection, or by the architect thereof. . . . The certificate of the inspector, indorsed with the approval of the chief of the district police, shall be conclusive evidence of a compliance with the provisions of this chapter. . . ." The statute requires the owner or architect to file the plans, and the penalty for the violation of the statute is placed upon the owner, lessee or occupant. R. L. c. 104, § 55.

A contractor engaged in the erection of a building is not required by this statute to file the plans; that is the duty of the owner or architect, and his failure to comply with the statute does not deprive the contractor of his rights under the contract. The certificate mentioned in the statute is not a condition precedent to recovering by one who supplies material and labor for such a structure.

The fact that the inspector had disapproved the plans submitted for the heating of the building — and that this fact was known to the plaintiff — did not deprive him of his right to recover if the work required by the plans and specifications was fully performed. It has been found that there was no failure on the part of the plaintiff to comply with all the terms of the undertaking. The defect was in the work done by the general contractor, who, in building the school house, carried out the original plan and constructed the ducts, as designed, for heating by a hot air system. *Burke* v. *Dunbar*, 128 Mass. 499. *Sherman* v. *Buffington*, 228 Mass. 139.

The fact that the defendant is a municipal corporation does not, so far as this statute is concerned, prevent the plaintiff from recovering; nor does the fact that the system was designed and laid out by an engineer of the Walworth-English-Flett Company, the subcontractor, who was not in the defendant's employ, disclose any fraud or deprive the plaintiff of his right to recover.

Exceptions overruled.

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ELIZABETH R. HIX, administratrix, *vs.* NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

Middlesex. March 5, 1918. — May 25, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Negligence, Employer's liability, Contributory. *Workmen's Compensation Act.*

In an action against a railroad corporation under St. 1906, c. 463, Part I, § 63, as amended by St. 1907, c. 392, and St. 1912, c. 354, for causing the death of one employed by it as a member of an engineering crew that had been engaged in cutting a new piece of road through a ledge, it appeared that the plaintiff's intestate was killed by the breaking of a rope by which he was being hoisted to the top of the cliff formed by the cutting after he had made some measurements on the face of the cliff, that the defendant had ropes at its storehouses twenty-five miles away but had none at the place of the accident and that the rope by which the intestate was hoisted had been found by the foreman of the engineering gang on the top of the cliff, where apparently it had been left by the contractor who had made the cutting, that this rope was tested in the presence of the foreman of the gang and the intestate and had been used by each of them at another point of the cutting and that the defendant's civil engineer in charge of the whole work saw and acquiesced in the use of the rope. *Held*, that the defendant's duty of exercising reasonable diligence to furnish its employees with necessary and suitable ropes and to inspect and repair them was none the less the duty of the defendant itself because it was left to be performed by its civil engineer or the foreman of the engineering gang, and that the jury would be warranted in finding that the rope which was provided for hoisting the intestate was weak and unsafe, that the defendant had not used proper care to inspect it and that the defendant was negligent in permitting this rope to be used for such a purpose.

Whether the provisions of St. 1911, c. 751, Part I, § 1, deprive a railroad corporation which is not a subscriber under the workmen's compensation act of the defences of contributory negligence and assumption of risk in an action brought against it under St. 1906, c. 463, Part I, § 63, as amended by St. 1907, c. 392, and St. 1912, c. 354, for causing the death of one of its employees, here was mentioned as a question which it was not necessary to decide in the present case.

In the case above described it appeared that the intestate was a minor, mainly occupied as a student in an engineering school, with little practical knowledge of engineering work, that the defective condition of the rope was not obvious, that the intestate did not know and had no reason to suspect that it was unsafe for use and had seen an experienced fellow employee test and use the rope, and that at the time of the accident he was acting in the line of his duty and was using the rope in a proper manner. *Held*, that there was no evidence on which

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the defendant could set up the defence that the employee was negligent or the defence that the employee had assumed the risk of the injury, if either of those defences was open to it under the statutes.

TORT against a railroad corporation under St. 1906, c. 463, Part I, § 63, as amended by St. 1907, c. 392, and St. 1912, c. 354, by the administratrix of the estate of Warren A. Hix, late of Concord, for causing the death of the plaintiff's intestate on October 9, 1913, when he in the employ of the defendant was engaged in making measurements on the face of a steep or vertical cliff adjoining the defendant's railroad property at Becket, by failing to provide a reasonably safe rope for the intestate to be lowered over the edge of the cliff for the purpose of making such measurements and to be hoisted up again. Writ dated October 2, 1914.

The declaration contained three counts, the first alleging a failure to provide the plaintiff with suitable appliances and a defect in the defendant's ways, works or machinery, the second alleging a failure to furnish the plaintiff with a sufficient number of reasonably careful and competent fellow servants, and the third alleging a failure to warn and instruct the plaintiff as to defects and dangers.

In the Superior Court the case was tried before *Wait*, J. At the close of the plaintiff's evidence, which is described in the opinion, the judge, at the request of the defendant, ruled that there was not sufficient evidence to go to the jury, and thereupon, by agreement of the parties, ordered a verdict for the defendant, and reported the case for determination by this court, with a stipulation of the parties that, if there was any evidence which should have been submitted to the jury, judgment should be entered for the plaintiff in the sum of $2,000; otherwise, judgment was to be entered for the defendant on the verdict.

The case was submitted on briefs.

C. H. Tyler, B. Corneau & B. E. Eames, for the plaintiff.

G. L. Mayberry & L. A. Mayberry, for the defendant.

DE COURCY, J. The plaintiff's intestate, Warren A. Hix, was instantly killed on October 9, 1913, while working as one of an engineering crew in the employ of the defendant. This action is brought to recover damages in the nature of a penalty prescribed by St. 1906, c. 463, Part I, § 63, as amended by St. 1907, c. 392,

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and St. 1912, c. 354. The only question presented is, whether there was evidence entitling the plaintiff to go to the jury.

The evidence would warrant the finding of the following facts: The defendant was building a new piece of road at Becket, the work of excavation being done by an independent contractor. At the place where the injury occurred a cut had been made through a ledge, and its sides were from fifty-five to sixty-five feet in height and substantially vertical. The contractor had finished his work at this place, with the exception of knocking off some projecting stone, and his men were working on the east end of the job, one thousand feet or more away. A gang of five engineers, all employees of the defendant, was making measurements for the final estimates of the amounts to be paid to the contractor. At times it was necessary for someone to go down the face of the cliff to measure the cross-sections; and this was part of the work of the chainman, Hix, or of one Boothby. A rope was needed for this purpose. While the defendant had ropes and other appliances at its storehouses in Pittsfield and Springfield, twenty-five miles away, it had none at the place of the accident. Boothby, who had charge of the engineering gang when the civil engineer Bonnemort was absent, found a rope, an inch or more in size, on the top of the cliff, — apparently abandoned or left there by the contractor. This rope was tested in the presence of Boothby and Hix. It was used by both, in turn, at another point in the cut. The foreman, Bonnemort, who was on the ground in the cut, saw and acquiesced in the use of the rope at the place of the accident. Here it was suspended over the rock edge of the cliff, the other end being wound around a stump, and held by one Strong. Hix went down, took some measurements, and returning had reached the edge of the cliff where Boothby was waiting to give him a hand, when the rope parted, and he fell to the bottom of the cut, and was killed.

The duty of exercising reasonable diligence to furnish its employees with necessary and suitable ropes, and the continuing duty of inspection and repair, was personal to the defendant. It could not be avoided by delegating its performance to the foreman. The failure of the foreman to supply and inspect the rope would be that of the employer whose duty he was undertaking to perform. *Ryan* v. *Fall River Iron Works Co.* 200 Mass. 188, 192. If the

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defendant saw fit to adopt the rope of another, rather than bring one of its own from a storehouse twenty-five miles away, its duty of inspection remained the same. *L'Hote* v. *S. B. Dibble Lumber Co.* 203 Mass. 294. *Tierney* v. *Merchants Steam Lighter Co.* 214 Mass. 540. The jury would be warranted in finding that the rope which was provided for the use of Hix was weak and unsafe, that the defendant had not used proper care to inspect it, and was negligent in permitting it to be used for such a purpose. *Doherty* v. *Booth,* 200 Mass. 522. *Golden* v. *Mannex,* 214 Mass. 502.

The defendant railroad company was not a subscriber under the workmen's compensation act, St. 1911, c. 751; and it is argued by the plaintiff that the company is deprived of the defences of contributory negligence and assumption of risk on the part of the intestate, by virtue of the provisions of Part I, § 1 of the act. On the other hand, the defendant contends that the railroad death statute, under which this action is brought, is not affected by the provisions in the workmen's compensation act dealing with the death of employees. Assuming, without deciding, that the defendant's contention is correct, nevertheless in this case there was ample evidence of the intestate's due care. He was a minor, mainly occupied as a student in an engineering school, with little practical knowledge of engineering work. He had seen an experienced fellow employee test and use this rope; and he was acting in the line of his duty and in a proper manner in using it. *Graham* v. *Badger,* 164 Mass. 42. *Donahue* v. *Buck & Co.* 197 Mass. 550. And as the assumption of risk was a matter of affirmative defence, it was for the jury to decide whether it was made out. It could be found that the defective condition of the rope was not obvious, and that Hix did not know or have reason to suspect that it was unsafe for use. *Leary* v. *William G. Webber Co.* 210 Mass. 68.

As there was evidence which entitled the plaintiff to go to the jury, on the first count at least, in accordance with the terms of the report the entry must be

Judgment for the plaintiff in the sum of $2,000.

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JAMES A. KEOWN *vs.* MARY E. KEOWN & others.

Suffolk. March 5, 6, 7, 1918. — May 25, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Equity Jurisdiction, Trust concerning land. *Trust*, Concerning land.

A bill in equity by a husband against his wife, alleging that the plaintiff caused certain parcels of real estate which he had paid for to be conveyed to the defendant, who "expressly agreed and declared that she held the title to said real estate for the benefit of the plaintiff," sets forth no valid trust, the alleged declaration of defendant not being alleged to be in writing as required by R. L. c. 147, § 1.

A bill in equity seeking to establish a trust in land alleged that the defendant made "a good and sufficient declaration of trust in favor of the plaintiff" but also contained an allegation that a year before the time of the alleged declaration the land by procurement of the plaintiff was conveyed to a person other than the defendant, and it was *held*, that, assuming that the averment quoted should be interpreted to mean that the defendant made a declaration in writing, such a declaration could establish no trust in land that did not stand in the name of the defendant.

BILL IN EQUITY, filed in the Superior Court on April 6 and amended on October 8, 1917, containing, as amended, the allegations which are described in the opinion.

The defendants demurred to the amended bill, and the case was heard on the demurrers by *Fox*, J., who made an order sustaining the demurrers. Later by order of the judge a final decree was entered dismissing the bill; and the plaintiff appealed.

J. A. Keown, pro se.

F. J. Muldoon, for the defendants.

DE COURCY, J. This suit is before us on the plaintiff's appeals from orders sustaining the demurrers and from the final decree dismissing the amended bill. The record improperly contains other matters which cannot be now considered, including a "petition to enjoin an action at law," an "affidavit contradicting due and timely service of notice," and an "appeal" from an order of a judge of the Superior Court striking from the record an alleged "bill of exceptions."

The bill in equity is informal and confusing; and the plaintiff's

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brief is devoted largely to matters not relevant to the issues raised by the demurrers. The main purpose of the bill is to compel the defendant Mary E. Keown, the wife of the plaintiff, to convey to him five parcels of real estate, and to account to him for the rents and profits. The title of the several parcels is set forth in the bill as follows: The first lot, on High and Oxford streets in Lynn, was purchased by him for $5,500 November 2, 1902, but the conveyance was made to his mother, Annie Keown. On April 25, 1904, she conveyed it to a corporation named the Wage Workers' Co-operative Emergency Hospital, receiving no consideration except a mortgage back for $7,500. This mortgage was assigned, on May 17, 1907, to the plaintiff's wife (the defendant Mary E. Keown); it was foreclosed on June 26, 1911, and the title was conveyed to her. On May 10, 1912, the property was mortgaged to a savings bank to secure a loan of $6,000. Two days later a conveyance was made to Margaret T. Hughes and she gave back to said Mary E. Keown a mortgage thereon for $11,000. The second parcel is on Hancock Street in Auburndale. The bill states that this was conveyed to the defendant Mary E. Keown in exchange for land in Alhambra, California, the title of which also was in her, although the consideration is alleged to have been paid by the plaintiff. Apparently there is no mortgage on this lot, but it is under attachment in an action to recover for repairs, and the taxes are in arrears. The third lot is in San Diego, California. This was conveyed to the defendant Mary E. Keown April 19, 1912, but the plaintiff alleges that the consideration (the amount of which is not stated), was money earned by him as a physician. The fourth lot is in Los Angeles County, California. The plaintiff alleges that this was conveyed to said Mary E. Keown on or about March 27, 1912, but that he paid the purchase price. The fifth lot is on 25th Avenue, San Francisco. In the original bill it is alleged that the defendant Mary E. Keown had arranged to purchase this land before her marriage to the plaintiff; and had paid $500 on account. In the amended bill it is further alleged that the conveyance was made in 1907, and that the plaintiff "has paid in part payments the purchase price."

Before considering whether the plaintiff has set up any ground for equitable relief against his wife, Mary E. Keown, it is plain

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that no case is stated against the other defendants. The only allegation as to Eugene F. Trudo and Margaret A. Sullivan is that they "are necessary parties to the final determination of these matters." The defendant James J. Hughes is not even named in the bill, so far as we have discovered. Margaret T. Hughes was made a party defendant; but the bill alleges that she is dead and that no administrator has been appointed for her estate. It appears in the record that James J. Hughes was appointed administrator and was allowed to come in and defend on November 5, 1917; but the plaintiff has not made him a party. As to all these parties at least the court rightly sustained the demurrers and dismissed the bill.

We now consider the allegations as to Mary E. Keown, hereinafter referred to as the defendant. Although the plaintiff prays for a conveyance to himself of the five parcels of real estate, what he apparently seeks is to have her legal title impressed with a trust in his favor. It is not contended that the legal title to any of this property ever was in the plaintiff's name. On the other hand, the allegations are that the record title as above set forth was all in accordance with his voluntary consent and procurement. No question arises here as to a trust resulting by implication of law, and we need not consider the difficulties in the path of such a claim, if made. *Pollock* v. *Pollock*, 223 Mass. 382. *Whitten* v. *Whitten*, 3 Cush. 191, 197. *McGowan* v. *McGowan*, 14 Gray, 119. *Cairns* v. *Colburn*, 104 Mass. 274. *Edgerly* v. *Edgerly*, 112 Mass. 175. *Cormerais* v. *Wesselhoeft*, 114 Mass. 550. *Fitzgerald* v. *Fitzgerald*, 168 Mass. 488.

What the plaintiff relies on throughout is the alleged existence of an express trust in his favor. The furnishing of the purchase money in whole or in part is set out merely as the basis or consideration for the alleged promises of the defendant namely, that she "expressly agreed and declared . . . that she held the title to said real estate for the benefit of the plaintiff." Obviously these are oral declarations, and they cannot avail the plaintiff, by reason of R. L. c. 147, § 1: "No trust concerning land, except such as may arise or result by implication of law, shall be created or declared unless by an instrument in writing signed by the party or by the attorney of the party creating or declaring the trust." There is an allegation as to the Lynn property that in February,

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1913, the defendant made "a good and sufficient declaration of trust in favor of the plaintiff." Assuming that by this is meant a declaration in writing, it does not help the plaintiff in view of his allegations that the title to this property was placed in the name of Margaret T. Hughes, by his procurement, as long ago as 1912.

It is clear that the plaintiff's bill does not set out a case entitling him to the relief he seeks in equity of impressing the real estate in his wife's name with a trust in his favor. As already stated, when the equity of redemption in the Lynn property was conveyed to Margaret T. Hughes, she gave back to the defendant a mortgage for $11,000. The bill contains no prayer with reference to this mortgage, nor is it referred to in the brief. But to avoid misapprehension, it may be said that, if the plaintiff should be advised that he has any claim on said mortgage, and should seek to enforce such claim, the dismissal of this bill is not to prejudice his rights in such suit. It should be added that we have not considered the California law, to which the plaintiff devotes a portion of his brief. The law of that State on which the plaintiff based his rights should have been set out as a fact. *Electric Welding Co. Ltd.* v. *Prince*, 200 Mass. 386. *Russell* v. *Joys*, 227 Mass. 263. *Peters* v. *Equitable Life Assurance Society*, 200 Mass. 579, 588.

Decree affirmed with costs.

FRANCES D. NILES *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Middlesex. March 6, 1918. — May 25, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Negligence, Contributory, Street railway.

In an action against a corporation operating a street railway for personal injuries sustained (when St. 1914, c. 553, was in force) by being struck by the overhang of a car of the defendant from which the plaintiff just had alighted, as the car turned at a right angle by means of a curve to go into a car barn at the end of its trip, there was evidence that the plaintiff had received a transfer check for another car of the defendant that was waiting a short distance ahead, that in response to a call from the conductor all the passengers had left the first car by the rear door, that the plaintiff was the last to alight, that as she stepped to the street an automobile came up and proceeded slowly at the

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plaintiff's right as she walked along by the side of the car and about two feet from it, that she was about midway between the car and the automobile, that as soon as the plaintiff left the car it started to go to the car barn and, when the plaintiff had taken three or four steps, she was struck in the back by the overhang of the car as it swung round the sharp curve. The plaintiff had followed in the line of the other passengers. Her testimony as to whether she knew that the car was going to turn into the car barn was conflicting. *Held*, that, with the presumption created by the statute, a finding was warranted that the plaintiff was not negligent.

In the case described above it had been held in a previous decision of this court reported in 225 Mass. 570, that the plaintiff at the time of the accident was not a passenger of the defendant and had only the rights of a person lawfully using the highway. There was evidence that immediately after the plaintiff alighted from the car the conductor closed the door and started the car to go to the car barn, that the car was a large pre-payment semi-convertible car, which in swinging round the curve would extend five feet and two and a half inches beyond the outer rail, that the conductor had given the plaintiff a transfer check and had reason to anticipate that in continuing her journey she would be alongside the car and would be prevented by the automobile from getting far enough away from the car to avoid being hit by it if it proceeded then to turn the corner to go to the car barn. *Held*, that it was a question for the jury whether the conductor was negligent in starting the car while the plaintiff was in such a perilous position and before she had an opportunity to reach a place of safety, without warning the plaintiff of the danger unappreciated by her to which she was exposed.

TORT for personal injuries sustained by the plaintiff on May 25, 1915, by reason of being struck by a street railway car of the defendant from which the plaintiff had alighted as a passenger on Galen Street in Watertown. Writ dated July 21, 1915.

In the Superior Court the case first was tried before *Lawton*, J. The jury returned a verdict for the plaintiff in the sum of $1,000; and the defendant alleged exceptions, which were sustained by this court in a decision reported in 225 Mass. 570.

The plaintiff having amended her declaration, as suggested in that decision, the case was tried again before *Keating*, J. The evidence at the new trial is described in the opinion. A copy in substance of a chalk which was used at the last trial is printed on page 318. At the close of all the evidence, upon the defendant's motion, the judge ordered a verdict for the defendant and thereupon, by agreement of the parties, reported the case for determination by this court, with the stipulation that, if the ordering of the verdict was right, judgment should be entered upon the verdict; but, if the case upon the evidence ought to have been submitted to the jury, judgment was to be entered for the plaintiff in the sum of $1,500.

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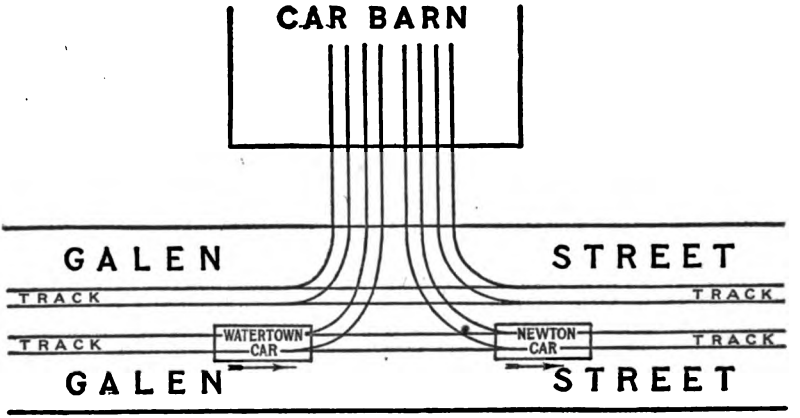
F. H. Stevens, for the plaintiff.

F. J. Carney, for the defendant.

De Courcy, J. The Watertown car on which the plaintiff was a passenger went no farther than the car barn on Galen Street. The car for Newton was waiting a short distance ahead, on the same track, and the conductor gave her a transfer check for that car. In response to his call all the passengers left the car by the rear door, the plaintiff being the last one to alight. It could be found that as she stepped to the street an automobile came up, and proceeded slowly at the right of the plaintiff as she walked



in the direction of the Newton car. She was walking alongside the Watertown car, about two feet from it, and midway between it and the automobile, and had taken three or four steps when she was struck in the back by the overhang of the car as it swung round the sharp curve leading into the car barn.

There was evidence for the jury of the plaintiff's due care. As the accident happened May 25, 1915, the due care statute (1914 c. 553) supplied a presumption in her favor, and made her contributory negligence an affirmative defence to be proved by the defendant. Further, the presence of the automobile in the narrow street left her a space only about four feet wide in which to proceed to the Newton car directly ahead; and she followed in the line of the other passengers. Her testimony as to whether she knew the Watertown car was going to turn into the car barn was conflicting.

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The question of the defendant's negligence is close. It was decided when the case was here before that the plaintiff was not a passenger at the time of the accident. *Niles* v. *Boston Elevated Railway*, 225 Mass. 570. But she was rightfully using the public way, and it was the duty of the defendant to use reasonable precaution to avoid injuring her. *Bryant* v. *Boston Elevated Railway*, 212 Mass. 62. The jury could find that the conductor closed the door and started the car round the curve immediately after the plaintiff alighted; that the car was a large pre-payment semi-convertible one, which, in swinging round this curve, would extend five feet two and one half inches from the outer rail; that he should have anticipated that she was still alongside the car, continuing her journey in pursuance of the contract of transfer to the Newton car issued by him, and was prevented by the automobile from getting far enough from the car to escape being hit if it should then proceed upon the curved track. In our opinion it was a question of fact for the jury to determine whether the conductor was negligent in starting the car while the plaintiff was in such a perilous situation, and before she had an opportunity to reach a place of safety, without even warning her of the danger unappreciated by her to which she was exposed. *Bryant* v. *Boston Elevated Railway, supra. White* v. *Connecticut Co.* 88 Conn. 614. *Walger*, v. *Jersey City, Hoboken & Paterson Street Railway*, 42 Vroom, 356. This was not the ordinary case where a pedestrian on the street fails to move or remain far enough from the track to avoid being struck by the rear of an approaching car as it swings around a curve. See *Widmer* v. *West End Street Railway*, 158 Mass. 49; *Brightman* v. *Union Street Railway*, 216 Mass. 152; *Miller* v. *Public Service Corp.* 86 N. J. L. 631; *Gannaway* v. *Puget Sound Traction, Light & Power Co.* 77 Wash. 655; *Kuhn* v. *Milwaukee Electric Railway & Light Co.* 158 Wis. 525; L. R. A. (N. S.) 1915 C 609 note.

On the evidence the case ought to have been submitted to the jury; and in accordance with the terms of the report judgment is to be entered for the plaintiff in the sum of $1,500.

Ordered accordingly.

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ALBIN M. RICHARDS *vs.* SECURITY MUTUAL LIFE INSURANCE COMPANY.

Suffolk. March 7, 1918. — May 25, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Jurisdiction. Comity. Conflict of Laws. Equity Jurisdiction, Of suit against foreign mutual insurance company. *Insurance,* Mutual life insurance company.

The courts of this Commonwealth will not take jurisdiction of a suit in equity by a citizen of the Commonwealth against a mutual life insurance company incorporated in the State of New York to determine the amount which should be paid by the plaintiff as premiums according to the provisions of a policy of insurance issued by the defendant, to restrain the defendant from declaring the policy forfeited and to compel it to accept a certain amount as full payment of premiums instead of a larger amount, fixed by a vote of the directors of the corporation and paid by the plaintiff under protest, where it appears that there are provisions of the policy under which it is renewable upon payment of advance premiums at the time and in the manner therein provided, "subject to the provision that, by action of the board of directors, the amount required for mortuary purposes may be raised to conform to the actual mortality experience of the" company, and that the policy must be construed according to the laws of the State of New York.

BILL IN EQUITY, described in the opinion, filed in the Superior Court on August 11, 1917.

The defendant demurred. The demurrer was heard by *Fox,* J., and was sustained. A final decree was entered dismissing the bill. The plaintiff appealed.

H. L. Brown, (*C. C. McCarthy* with him,) for the plaintiff.

A. E. Pillsbury, (*G. M. Palmer* with him,) for the defendant.

DE COURCY, J. It appears from the copy of the policy, filed by the plaintiff, that it was issued on April 25, 1895, by the Security Mutual Life Association of Binghamton, New York. Even if we assume that the defendant "Insurance Company" has legally been substituted for the "Association," as the party liable under the policy, the defendant's obligation must be ascertained by the language of that instrument, — whose terms could be altered only by a writing "signed by the Secretary and General Manager."

One of the conditions of the policy was: "This contract of insurance is renewable at the option of the insured, before expiration,

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upon payment of the advance premiums at the time and in the manner herein provided, subject to the provision that, by action of the Board of Directors, the amount required for mortuary purposes may be varied to conform to the actual mortality experience of the Association." The bill alleges that the defendant increased the annual premium from the original sum ($92.55) to $123.85 in April, 1911, and since then has progressively increased the amount of the premium from year to year; and that he has paid the same under protest. The bill was brought to enjoin the defendant from increasing the annual premiums, to compel it to perform its contract on the annual payment of the original premium, and to account for the increased amounts already paid.

It is settled by the recent case of *Rosenfeld* v. *Boston Mutual Life Ins. Co.* 222 Mass. 284, that the plaintiff cannot recover back the premiums which the defendant collected under a claim of right. There remains the application to compel the defendant to accept the original annual premium as a performance by the plaintiff of his part of the contract.

The first ground of the defendant's demurrer is, that the bill does not set out a case of which the court has or will take jurisdiction. It appears that the defendant is a "mutual life insurance" corporation, created by and existing in the State of New York. There is a meager allegation that "it is doing business in this Commonwealth;" but no statement that it has a usual place of business or any property or officer here. Service of the bill was made upon the corporation by leaving attested copies of the subpoena at the office of our insurance commissioner, presumably in compliance with the provisions of R. L. c. 126, § 4.

We assume that the record shows sufficient jurisdiction in our courts over the person of the defendant to enforce its liability in transitory actions, such as debts due upon matured policies. *Reynolds* v. *Missouri, Kansas & Texas Railway*, 228 Mass. 584. *Dolan* v. *Mutual Reserve Fund Life Association*, 173 Mass. 197. But the purpose of this suit is to have our courts not only determine the proper amount of the plaintiff's annual premium, but to compel this foreign corporation to accept that amount as full payment, and to refrain from declaring the policy forfeited, although the instrument expressly provides that the amount may be varied by the board of directors, and that the policy must be construed according to the

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laws of the State of New York where it was executed. Adopting the language of this court in *Kimball* v. *St. Louis & San Francisco Railway*, 157 Mass. 7, 8, "it seems to us clear that, as among the States of this Union, the plaintiffs ought to resort in the first instance to that court which alone can declare the law of the case with authority, and can compel obedience to it by force. It would be a misuse of our powers to attempt to control the action of those courts in a case like this, by an adjudication which would depend upon them for enforcement, and which they might say had mistaken the [New York] law." *Smith* v. *Mutual Life Ins. Co. of New York*, 14 Allen, 336, 341. *Williston* v. *Michigan Southern & Northern Indiana Railroad*, 13 Allen, 400. And there is the further objection to entertaining jurisdiction in this case, that a review of the action of the directors in increasing the annual premium involves the internal relations between a foreign mutual corporation and its members. *Peters* v. *Equitable Life Assurance Co.* 196 Mass. 143, 149.

In view of our conclusion that the demurrer was rightly sustained on the ground of jurisdiction, we express no opinion on the merits of the plaintiff's case.

Decree affirmed.

VAHAN ANANIAN & others *vs.* SAMUEL M. MELKON & another.

Suffolk. March 7, 1918. — May 25, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Equity Pleading and Practice, Appeal, Exceptions to master's report, Master. *Evidence*. *Mortgage*, Of real estate: foreclosure.

Where a suit in equity is referred to a master, to whose report the plaintiff files twenty objections and exceptions, the twentieth being an exception to a refusal to admit certain testimony, and, after a hearing, a judge files a memorandum stating that he sustained the seventeenth and overruled the other exceptions, and an interlocutory decree is entered sustaining the seventeenth exception and recommitting the suit to the master as to certain matters therein mentioned, from which decree no appeal is taken, if, after the filing of the master's supplemental report the suit is heard upon the master's reports and a final decree is entered confirming the reports and dismissing the bill, from which the plaintiff appeals, there is not brought to this court by such an appeal the question whether the exceptions of the plaintiff to the master's report should be sustained.

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In this case, it appearing that the rule of reference of the suit to the master did not direct him to report any evidence, it was *said* that, all the exceptions other than the twentieth and the seventeenth being to findings of fact and to refusals to report evidence, they were overruled properly.

The twentieth exception was to a refusal of the master to admit in rebuttal testimony of a witness to the effect that the plaintiff previous to the bringing of the suit made statements to the witness consistent with those as to which he testified at the hearing; and it was *said* that the exclusion of the testimony was proper.

A statement in a notice of a sale in foreclosure of a mortgage of real estate, that the premises would be sold "subject to the amount unpaid on a prior mortgage of record of $5,500 . . . and all unpaid taxes, liens and assessments," does not make the sale invalid by reason of the fact that the amount due on the prior mortgage at the time of the notice was $5,275.

A suit in equity to have a second mortgage of real estate declared invalid because procured by fraud, to have a sale in foreclosure declared invalid because the plaintiff, the mortgagor, was not notified and the sale was carried out by a fraudulent conspiracy in which the purchaser shared, and to permit the plaintiff to redeem, properly was dismissed where it appeared from findings of a master confirmed by the trial judge that the facts were not as alleged in the bill.

BILL IN EQUITY, filed in the Superior Court on May 15, 1915, by the former owners of land with buildings thereon on Coolidge Hill Road in Watertown subject to a mortgage for $5,500 to the Cambridge Savings Bank and to a second mortgage for $500 to the defendant Melkon, alleging that the mortgage for $500 was obtained by Melkon by fraud and fraudulent misrepresentations, that Melkon had caused it to be foreclosed by public sale, that the sale was undertaken and carried out by Melkon in bad faith without notice to the plaintiffs and that the property was sold to the defendant Arakil, who, in conspiracy with Melkon, purchased in bad faith. The prayers of the bill were for a determination of the validity of the mortgage to Melkon, a declaration of the invalidity of the foreclosure sale and, if the mortgage were proved to be valid, that the plaintiff might be permitted to redeem.

The suit was referred to a master "to hear the parties and their evidence and report his findings to the court together with such facts and questions of law as either party may request."

The plaintiff filed twenty objections and exceptions to the master's report. The twentieth exception was to the exclusion of the following testimony, offered by the plaintiffs in rebuttal on the issue whether the plaintiffs had notice of the foreclosure proceedings:

The plaintiffs offered to prove in rebuttal, that Arakel Ananian,

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one of the plaintiffs, after he had received the newspaper from the witness Rugg, and on the same day, went to see one Caragulian at the latter's home on Mount Auburn Street in Watertown, and that the said Caragulian would testify that Arakel Ananian did call on him on this particular Sunday with the newspaper given to Arakel by Mr. Rugg. That Arakel Ananian was in an excited and nervous state at the time; that Mr. Caragulian took charge of the matter. On the following day, which was Monday, he and Mr. Ananian consulted Mr. Sevasly, of counsel for the plaintiffs.

The witness Rugg would testify that, sometime in the latter part of April, or early in May, he was passing by the building on Coolidge Hill Road and saw one of the plaintiffs watching the property. The witness said to the plaintiff, "What are you doing here?" The plaintiff answered, "I am watching the property." The witness then said, "You are watching somebody else's property because I see by the paper that it has been foreclosed." The plaintiff then said that neither he nor his brother knew anything about it, and the witness told him to send his brother to him and that he would tell him all that he knew. On the following Sunday, which was a day or two after the conversation above set forth, Arakel Ananian, one of the plaintiffs, called to see the witness Rugg, and the witness informed him of the foreclosure. The witness looked for the papers in which the foreclosure notice had appeared. He found three copies of the newspaper, of which he gave one to Arakel Ananian. Arakel Ananian expressed surprise at what happened and said that he knew nothing about it.

The exceptions were heard by *Hardy*, J., who filed a memorandum reading as follows: "The fourteenth exception is sustained. The master should have reported material facts as to the notice as stated in objection numbered 14. Other exceptions overruled."

An interlocutory decree accordingly was entered sustaining the fourteenth exception and recommitting the suit to the master as stated in the opinion. There was no appeal from this decree.

From the findings of the master in his supplemental report, it appeared that the notice of the foreclosure sale stated: "Said premises will be sold subject to the amount unpaid on a prior mortgage of record of Fifty-five Hundred Dollars ($5,500.00), held by the Cambridge Savings Bank, and all unpaid taxes, liens and assess-

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ments," and that at that time there was due on the prior mortgage $5,275.

Thereafter the suit was heard upon the pleadings and the two reports of the master by *Wait*, J., and a final decree was entered upon his order confirming the reports and dismissing the bill. The plaintiffs appealed.

S. L. Bailen, (*S. B. Stein* with him,) for the plaintiffs.

C. J. Muldoon, Jr., for the defendants, was not called upon.

CARROLL, J. The plaintiffs in this bill in equity seek to set aside the foreclosure of a mortgage of real estate, held by the defendant Melkon, and to redeem the property therefrom. The case was referred to a master who found that the mortgage was given for a valuable consideration and was not obtained through fraud or misrepresentation; that the plaintiffs had notice of the foreclosure proceedings and could have protected their interest in the property if they so desired; that a proper notice of sale was published as required by law, and that the proceedings were in accordance with the requirements of the statute. He further found that the defendant Arakil was a *bona fide* purchaser for value at the foreclosure sale.

In the Superior Court the judge filed a memorandum overruling all the plaintiff's exceptions to the master's report except the fourteenth, and an interlocutory decree was entered sustaining this exception. The case was recommitted to the master to report, without further testimony, certain material evidence submitted to him at the hearing. No appeal was taken from the interlocutory decree. The master then made a supplemental report, and the final decree was entered confirming the report as submitted and ordering that the bill be dismissed, from which the plaintiffs appealed.

The interlocutory decree, sustaining but one of the plaintiff's exceptions, was not appealed from; even if the exceptions were before us, see *Craig* v. *Warner*, 216 Mass. 386, we find no reversible error in the conduct of the hearing. Many of the exceptions are to the master's refusal to report certain evidence and to his findings of fact. Under the reference he was not required to report the evidence, *Martin* v. *Barnes*, 214 Mass. 29, *Smith* v. *Lloyd*, 224 Mass. 173; and where it is not reported his findings are conclusive, *O'Brien* v. *Murphy*, 189 Mass. 353, 354.

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The master excluded certain testimony offered by the plaintiffs in rebuttal, tending to show that one of the plaintiffs made statements consistent with those made at the hearing; the plaintiffs excepted. According to the memorandum of the presiding judge this was one of the exceptions intended by him to be overruled. But even if it were before us, the master was right in excluding the testimony: the statement of a witness made out of court, cannot be used to corroborate his testimony before the master. *Commonwealth* v. *Jenkins*, 10 Gray, 485. The evidence was not admissible within the exception to this rule allowing such evidence to be introduced where an attempt is made to impeach the witness, or where it is sought to discredit him by showing that his testimony was of recent invention or he was unduly influenced to testify as he did. See *Griffin* v. *Boston*, 188 Mass. 475; *Commonwealth* v. *Marshall*, 211 Mass. 86 and cases cited.

We discover no error in the notice of foreclosure. This case may be one of hardship for the plaintiffs; but according to the findings of the master, they were fully notified of the foreclosure proceedings and had ample opportunity to protect their rights, and there was evidence to support this conclusion. We cannot review the master's findings of fact.

Decree affirmed.

GERTRUDE O. HALLETT'S (dependent's) CASE.

Suffolk. March 7, 1918. — May 25, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Workmen's Compensation Act. Evidence, Matter of conjecture.

A woman twenty-eight years of age apparently in perfect health, who never had fainted nor been ill, was employed as a bookkeeper by a wholesale grocer. On a day when, after her work was over, she was to start with her husband on a vacation, she returned from luncheon to her place of employment, went up a flight of five granite steps carrying in each hand a packed travelling bag and when on the top step fell forward into her employer's store and died soon after without regaining consciousness. The steps were in good condition. There was evidence of an expert that she did not die from any internal cause. Her husband filed a claim under the workmen's compensation act as her dependent, and the Industrial Accident Board found that the death of the employee arose out of and in the course of her employment and awarded him compensation. *Held*, that, as the

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cause of the employee's fall was unexplained and as it did not appear that the board had passed on the question of the cause of her injury, it was *ordered* that the case be recommitted to the Industrial Accident Board to find the cause of the employee's fall or to find that the cause was unknown.

In the case above described it was *said* that, if the employee's injury was caused by her physical or mental condition not arising out of her employment or was brought about by her exertions in her own affairs or by any other cause than her employment, the dependent husband could not be awarded compensation.

APPEAL to the Superior Court under St. 1911, c. 751, Part III, § 11, as amended by St. 1912, c. 571, § 14, from a decision of the Industrial Accident Board awarding compensation to John Lawrence Hallett as the dependent husband of Gertrude O. Hallett, who died on August 18, 1917, by falling at the top of a flight of granite steps leading to the store where she was employed as a bookkeeper by the S. K. Dexter Company, a corporation carrying on the business of a wholesale grocer at Lowell.

The case was heard by *Wait*, J. The evidence on which the decision of the Industrial Accident Board was based is described in the opinion. The claimant testified that at the time of the accident his wife was twenty-eight years of age and "Her health was perfect. She worked every day. They grew up together; that he had known her for about fifteen years. During this time he had never known her to faint or be ill." He also testified, in regard to the travelling bags that his wife was carrying, that "They were going on a vacation when she got through her work, and the bags were packed with this in view." The employee was taken to a hospital where she appears to have died without regaining consciousness.

The judge made a decree in accordance with the decision of the Industrial Accident Board that the "death of the deceased employee arose out of and in the course of her employment; and that the claimant, John Lawrence Hallett, the husband of the deceased, was wholly dependent upon her for his support, being conclusively presumed to be so by the statute, and is, therefore, entitled to a weekly compensation of $8.67 for a period of five hundred weeks from August 18, 1917, the date of the injury, said sum not, however, to exceed $4,000." The insurer appealed.

G. Gleason, for the insurer.

S. E. Qua, for the dependent husband.

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CARROLL, J. The deceased employee, on August 18, 1917, when returning from lunch, fell, while ascending a flight of granite steps on her employer's premises, and received injuries which caused her death. Her husband, claimant, testified: "She had a grip about fourteen inches long and ten inches high in the left hand, and in the right hand a regular grip, a Gladstone Bag, about eighteen inches long and about a foot high. She had a sweater on her arm. The bags had things in them." The steps in question were five in number; they were eight inches high and twelve inches wide except the bottom step which was nine inches high, and the top step was twenty-five inches wide including a three-inch threshold, which was raised one sixteenth of an inch above the step. It was agreed that the steps were in good condition. There was evidence that the employee was on the top step when she fell forward into the employer's store. From the testimony of two of the witnesses who were present, it might be found that she did not trip on the threshold or step, but fell from some unexplained cause. One witness testified he was under the impression that she caught her foot on the outer edge of the top step.

To recover under the workmen's compensation act for an injury resulting from a fall, it must be shown that it arose out of the employment. If it resulted from other causes, the statute does not apply. A fall on the floor or on a flight of stairs or on any part of the employer's premises while occupied in his own affairs, if not explained, does not entitle the employee to compensation. Under the act the burden is upon him to show that it arose out of or was caused by the employment. If an employee falls from over exertion while engaged in his own business and not engaged in the business of his employer, or, if a woman carrying in each hand a travelling bag filled with personal luggage and not engaged in the employer's business, in ascending a flight of steps trips on her dress because unable to hold it up or falls because of the weight she is carrying, it cannot be said that the employment caused the injury. Although an employee falling under a heavy weight, — even if he falls on a smooth floor free from defect, — may be found to have been injured by the employment, if he is engaged in it at the time, an employee doing his own individual work under similar conditions cannot attribute a fall to the employment. In every case, under the act, there must be the relation of cause and

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effect between the employment and the injury. See *McNicol's Case*, 215 Mass. 497; *Maggelet's Case*, 228 Mass. 57.

If Mrs. Hallett did not strike her foot against the top step or the threshold, but because of the baggage she was carrying became weak or tired and fell; or, if she fainted or caught her foot in her clothing or fell from some unexplained cause, the claimant is not entitled to compensation. Even if she tripped on the step or the threshold, if this was caused by her own condition and not by the employment, the insurer is not liable. Stated in another way, if Mrs. Hallett tripped and fell and this did not arise out of her employment but was caused by her physical or mental condition or was brought about by her exertions in her own affairs or by any cause other than the employment, the dependent husband cannot be awarded compensation.

The expert evidence, that the deceased did not die from any internal cause, does not show that her injury resulted from her employment. It does not appear that the board passed on the question of the cause of her injury. They found that the employee fell forward over the threshold, and that the danger of falling was incidental to her employment; but they did not find the cause of the injury, nor is it stated that the cause is unknown. The report does not show the approximate weight of the bags and their contents, how far they had been carried, the condition of the weather on the day of the employee's death, the length of time she was away from the employment, or what she did in the interval. Findings on these questions may have some bearing on the issue to be decided.

It follows that the case must be recommitted to the Industrial Accident Board to find the cause of Mrs. Hallett's fall; if the cause is found to be unknown, so to state; and if the cause is known, to find what that cause was. At such hearing further evidence may be introduced by both parties.

So ordered.

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JOSEPH H. FELDMAN *vs.* TILLIE FELDMAN.

Suffolk. March 8, 11, 1918. — May 25, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Divorce, Objection to decree absolute. *Rules of Court. Superior Court.*

The Superior Court had authority to establish Divorce Rule 6, relating to objections to the granting of a decree absolute.

Objections, "subscribed and sworn to" by the libellee in a suit for divorce, which merely set out that, in granting a decree *nisi*, the "court was misled and deceived," that the decree "was procured by false and perjured testimony introduced by the libellant," that since the granting of the decree "new evidence unknown to your libellee at the time of the hearing" of the libel had "come to her knowledge," which evidence was "material, and was not within her knowledge or control at the time of granting of said decree," properly may be dismissed as not complying with the requirement of Divorce Rule 6, that the facts upon which such objections are founded shall be "set forth specifically."

A judge, before whom was tried a libel for divorce and by whose order a decree *nisi* had issued, within six months after which objections were filed to the entry of a decree absolute which could not be sustained because they did not comply with the requirements of Divorce Rule 6, may refuse to entertain a "supplemental objection" filed eight months after the entry of the decree *nisi*, which is not an amendment of the objections formerly filed but contains a new charge alleging adultery by the libellant within six months after the entry of the decree *nisi*.

Whether, as a matter of discretion, the judge had power to allow new objections to be filed more than six months after the entry of the decree *nisi* and before the entry of a decree absolute, or to allow those formerly filed to be amended, was not determined, because in this case the judge refused to exercise any discretion in favor of the objections.

LIBEL FOR DIVORCE, filed on November 16, 1916, alleging as cause cruel and abusive treatment on the part of the libellee.

The libel was heard by *Dubuque*, J., and a decree *nisi* was entered on January 26, 1917. On July 25, 1917, the libellee filed a document with the title "Objections to Entry of Absolute Decree," which set out as "cause of such objections" the following:

"1. That in the granting of said decree the court was misled and deceived.

"2. That said decree was procured by false and perjured testimony introduced by the libellant.

"3. That since the granting of said decree new evidence unknown to your libellee at the time of the hearing of said libel for divorce has come to her knowledge.

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"4. That such newly discovered evidence is material, and was not within her knowledge or control at the time of the granting of said decree."

This document bore a statement signed by a justice of the peace, that it was "subscribed and sworn to" before him.

On September 29, 1917, the libellee filed a further document entitled "Libellee's Supplemental Objection to Entry of Decree Absolute," which stated that the libellee objected to the entry of the decree absolute "and for further cause to objection signs the following, to wit:

"That the said libellant Joseph H. Feldman has since the entry of the decree *nisi* therein and within six months thereafter, and particularly during the months of June and July of 1917, and at divers other times to said libellee unknown, has been guilty of the crime of adultery with persons to said libellee unknown."

This document bore an affidavit that the statements therein were true to the best of the libellee's knowledge and belief.

The objections were heard by the trial judge. The libellee made several requests for rulings raising in substance the questions dealt with in the opinion. The trial judge filed a memorandum in substance dismissing the objections because they did not comply with Divorce Rule 6, and ruling that he had no discretion to permit the filing of the supplemental objection, and, if he had, that he should refuse to permit it to be filed.

The libellee alleged exceptions and also filed a document entitled a claim of appeal.

J. F. Barry, (*J. Isaacs* with him,) for the libellee.

W. J. Patron, for the libellant.

De Courcy, J. "Decrees of divorce shall in the first instance be decrees *nisi*, and shall become absolute after the expiration of six months from the entry thereof, unless the court before the expiration of said period, for sufficient cause, upon application of any party interested, otherwise orders." R. L. c. 152, § 18. Divorce Rule 6 of the Superior Court provides: "At any time before the expiration of six months from the granting of a decree of divorce *nisi*, the libellee, or any other party interested, may file in the office of the clerk for the county in which the libel is pending, a statement of objections to an absolute decree, which shall set forth specifically the facts on which it is founded, and be verified by

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affidavit. Such decree shall not become absolute until such objections have been disposed of by the court." The court had authority to establish this rule, and it has the force of law. *Pratt* v. *Pratt*, 157 Mass. 503, 505.

The decree *nisi* in this case was entered on January 26, 1917. The objections filed by the libellee on July 25, 1917, were rightly dismissed as not in compliance with said rule. The first and second causes assigned were not specific allegations of facts. *May* v. *Wood*, 172 Mass. 11. *Brown* v. *Brown*, 207 Mass. 254. The third and fourth were insufficient for the same reason, and had the additional defect that they did not comply with the established practice as to newly discovered evidence. Rule 24, of the Superior Court. *Borley* v. *Allison*, 181 Mass. 246. And there was no error in dismissing the supplemental objection. This was not filed until September 29, 1917; and it was not an amendment of the original objections, but an entirely new charge of adultery, alleged to have been committed by the libellant within six months after the entry of the decree *nisi*. The rule of court limiting the time within which objections might be filed was binding upon the trial judge. It is unnecessary to consider whether the court has discretionary power to allow new objections to be filed, or old ones to be amended, after the expiration of six months from the entry of a decree *nisi* but before the decree is made absolute, because here the judge expressly refused to exercise any discretion he might have in favor of entertaining the objections. See *Pratt* v. *Pratt*, *supra*; *Norton* v. *Lilley*, 214 Mass. 239.

The libellee's requests for rulings have not been argued. But so far as applicable to the facts they are disposed of by the foregoing.

Exceptions overruled.
Appeal dismissed.

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PHILIP E. MURPHY vs. OLD COLONY STREET RAILWAY COMPANY.

Bristol. March 11, 1918. — May 25, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Negligence, Employer's liability, In use of electricity. *Electricity*. *Evidence*, Matter of conjecture.

In an action against a street railway corporation by an experienced lineman for personal injuries sustained in the year 1907, when in the defendant's employ, by falling from a pole by reason, as alleged, of coming in contact with the defendant's telephone wires on a cross arm of the pole which had become charged with a dangerous current of electricity alleged to have passed to them from certain high tension wires maintained by the defendant on another cross arm on the same pole, it appeared that when the plaintiff went on the pole the current had been shut off from all the high tension wires, which thereby had been made "dead" so that the place was safe to work in, and there was evidence, introduced by the plaintiff, which, if believed, tended to show that afterwards the current had been turned on upon a part of the high tension wires, which in this way became alive and transmitted a part of the electricity to the telephone wires with which the plaintiff was said to have come in contact, but there was nothing to show how these wires became alive and it was a matter of pure conjecture by whose order the current was turned on. *Held*, that there was no evidence of negligence for which the defendant was liable, it being equally probable that the defendant was not at fault or that the dangerous condition was caused by a fellow servant of the plaintiff for whose negligence the defendant was not legally accountable to the plaintiff.

In the case above described it was *said* that, there being no evidence to show negligence of the defendant at common law or under the employers' liability act, it had become unnecessary to consider the question of the due care of the plaintiff in failing to use a safety belt with which he was provided or other questions that had been raised at the trial.

TORT for personal injuries sustained on February 17, 1907, by a fall from a pole of the defendant when the plaintiff was at work as a lineman in the defendant's employ, the declaration containing counts at common law and under the employers' liability act as described in the opinion. Writ dated June 3, 1907.

In the Superior Court the case was tried before *White*, J. The evidence is described in the opinion. At the close of the evidence the judge, granting a motion in writing to that effect filed by the defendant, ordered a verdict for the defendant; and the plaintiff alleged exceptions.

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J. W. Cummings, (*C. R. Cummings* with him,) for the plaintiff.

E. P. Saltonstall, (*J. T. Swift & C. W. Blood* with him,) for the defendant.

CARROLL, J. The plaintiff, an experienced lineman, while in the employment of the defendant, was injured severely by falling from a pole in Fall River, about 4 o'clock Sunday morning, February 17, 1907. He contended that he was injured by reason of an electric shock and an electric burn on his heel, when in contact with the defendant's telephone wires, causing him to lose consciousness and fall; the defendant contended that the plaintiff did not receive a burn or shock, but fell by losing his balance while standing on a cross arm of the pole. The judge ordered a verdict for the defendant.

The defendant operated an electric street railway from Quincy to Fall River. The electric power was generated at Quincy and was carried to the several distributing or substations on high tension wires; the high tension line was controlled in the Quincy station and in the various substations by means of an oil switch and hand switches. The substations were Rockland, Brockton, Bridgewater, Taunton and Fall River, — the Quincy station being at the extreme north and Fall River at the extreme south end of the line. The different lines had distinguishing letters and numbers, the initial letter of the station being used for the purpose, except in the case of Bridgewater, which was called W. The line from Taunton to Fall River was No. 94TF. The line generally consisted of three high tension wires on a double cross arm on the top of a high pole, two wires on one side of the pole and one on the other. From Quincy to Brockton the line had six high tension wires. On the same pole, and below the cross arm carrying the high tension wires, was a cross arm carrying four telephone wires (owned by the defendant) parallel to the wires above. Two of these wires were on each side of the pole and constituted a telephone circuit, on each side, which was operated as a part of the defendant's system, one circuit being in regular use and the other a spare line. On the pole where the plaintiff was injured the cross arm supporting the telephone wires was eight and one half feet below the high tension cross arm.

The power for the telephone wires came from dry batteries. With a portable hand service or test box the operator could tap the

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wire and cause a bell to ring in the station. The system used for turning off the power for the safety of men working near the high tension equipment was known as the "red tag" system and was in substance this: The foreman having charge of the work to be done informed the operator in Taunton or Fall River, and asked him to have the particular line killed, giving his name, the line to be killed and the work to be done. This message was repeated by the operators and each operator wrote on a red tag the name of the station, the time the line was killed, and additional data. The tag was then tied to the operating handle, the oil switch was opened and the hand switches disconnected. The person giving the direction was then informed that the line was red tagged and safe for use. The tags were not to be removed until ordered off by the one who directed that the current be turned off. After a line was killed and before beginning work, a chain was thrown over the high tension wires, touching the ground making a short circuit.

The plaintiff began work a little after midnight. Before ascending the pole all the rules of the defendant were complied with by the foreman: the lines between Taunton and Fall River red tagged, the power shut off between these substations and the wires short circuited. When the plaintiff was injured there was no power in the high tension wires between these two places. A pole, which was a part of an old line and within fifteen feet of one of the new poles, had to be taken down and its equipment disposed of. The plaintiff and one Mitchell, a fellow employee, began at the top of the old pole, which was thirty feet high, and stripped it of the high tension wires (fastened to porcelain insulators), and removed the cross arm supporting them. Mitchell then descended and began to lower the telephone wires on one side of the pole. These wires on both sides were on insulators set on pegs. The plaintiff stood on the cross arm on the opposite side from Mitchell and cut the guy wires. He testified he unsnapped his safety belt (this belt had a ring in it on each side over the hip, with a strap to be fastened round the pole, and each end snapped into the ring, so that if one lost his hold, his fall would be retarded as he slipped down); that he saw a toe bolt on the pole and braced himself on the telephone cross arm, took a hatchet from his belt to strike the bolt, when he received a shock of electricity; that his next recollection was when he was in the hospital.

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It was admitted that the plaintiff did not come in contact with any wires except those of the telephone; and there was no power in the high tension wires; "he had been handling them; . . . they were as dead as a door nail." There was evidence that under certain conditions a slight shock might be received from the telephone wires when the power was on the wires immediately above, but that this shock was not severe enough to cause a burn, nor could the electric force in the telephone wires which came from the dry batteries cause such a burn.

The plaintiff cannot recover simply because he fell. He bases his claim entirely on the fact that the power was on the high tension wires somewhere between Taunton and Quincy — notwithstanding the line was short circuited and the power off between Taunton and Fall River — because of the fact that the high tension line being parallel to the telephone wires a current was induced into them from the high tension wires which caused the burn and shock sufficient to throw him from the pole. He introduced evidence from two experts, as follows: "If there was a current flowing through the line at any point between Quincy and Taunton, and telephone wires parallel to those high tension wires it is quite possible that you might have very high potentials induced to the telephone wires." And the "shock and burn could be caused, if the power was off between Taunton and Fall River by some other part of the telephone line being in inductive relation to the high tension circuit."

The defendant's evidence showed that during the entire time the plaintiff was working the power was off on all the lines from Quincy to Fall River at the request of different employees in charge of work between the several stations; and the jury could have found that this was true, notwithstanding the error made by the Brockton operator in certain entries on the back of one of the red tags. The defendant contended that even if the power were on between some of the stations north of Taunton and at the generating station, the plaintiff could not receive a shock sufficient to cause a burn; that the telephone wires were four and one half inches above the cross arm, and standing on the cross arm the plaintiff's heels would not come in contact with them; that the parallel lines where Mitchell was standing contained no electricity; that if both the plaintiff's feet were against the wires and he was

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exposed to the same electrical contact, if he was burned in one heel a burn would also appear in the other; and that, even if the telephone wires were charged with the induced electricity, they were transposed every five hundred feet and were therefore exposed to the same influence, and there would be no tendency for the current to flow from one wire to the other if the lines were at the same voltage. Further, that, if the plaintiff received an injury from the telephone wires, it would be expected that the fuse would blow out; no fuse did blow out; that the line was equipped with protectors and therefore a burn could not be received from these wires. The plaintiff produced testimony to show that he received an electric burn in one heel. This was denied by the defendant; and, in addition to other evidence to the effect that the mark on the plaintiff's heel was not such a burn, it appeared that when he was injured he had on woolen socks, shoes and overshoes, and there was no evidence that they showed any burn.

The electric shock received by the plaintiff could not have been caused by the current of electricity induced into the telephone wires from the high tension wires between Taunton and Fall River; the line was dead between these stations and the plaintiff admitted these wires had no power in them. He contended that the injury was caused by a current passing to the telephone wires from the high tension wires north of Taunton when the current was on somewhere between Quincy and Taunton.

When the plaintiff began work the telephone wires were dead; and during the night when he had occasion to handle them, they were in the same condition. Some time after midnight and before four o'clock in the morning — at which time the plaintiff was hurt — assuming his evidence to be true, the current from the high tension wires was induced into the telephone wires. This resulted either from the direction of some foreman or other employee who, under the defendant's rules, had the right to order the current on when the repair work was finished, or, from the negligence of some operator north of Taunton, who was a fellow servant of the plaintiff, in turning on the current when he had no right to turn it on unless directed to do so by the one who had previously ordered the current off.

A duty rested upon the defendant to furnish the plaintiff with a reasonably safe place to work. If, in accordance with its rules

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and the "red tag" system, a foreman or other person delegated with authority to direct when the current should be on or off, ordered the current on at some place between Quincy and Taunton, it could be found that the defendant had failed to perform this duty. See *Hopkins* v. *O'Leary*, 176 Mass. 258; *Hooe* v. *Boston & Northern Street Railway*, 187 Mass. 67. If, however, the high tension wires north of Taunton became alive through the negligence of an operator or some other person acting without authority, and who was negligent in violating the rules, then the injury resulted from the negligence of a fellow servant; this was a risk which the plaintiff assumed and was one for which the defendant is not liable. If it be true that the plaintiff was injured by the negligence of such a fellow servant, he cannot recover under the second count of his declaration, which alleges defective appliances. *Siddall* v. *Pacific Mills*, 162 Mass. 378. *Grebenstein* v. *Stone & Webster Engineering Corp.* 205 Mass. 431. *McKenna* v. *Lynn Gas & Electric Co.* 219 Mass. 208.

The defendant introduced evidence, which was uncontradicted, that during the time the plaintiff was at work all the wires were dead and no current was passing from the generating station at Quincy; and produced the red tags showing this to be true. The jury could disbelieve this evidence, but, if they did and relied on the expert testimony of the plaintiff, there is nothing to show by whose direction the wires became alive; in the absence of any evidence bearing on this question, it is pure conjecture to say by whose orders the current was turned on. The place was safe to work in if the wires were dead, and the burden was on the plaintiff to show that it became unsafe by the negligence of the defendant. There was no evidence that it became unsafe from this cause, — by reason of some one acting in obedience to the defendant's rules, — it is just as probable that it became unsafe through the negligence of some one for whom the master was not responsible. To recover, the plaintiff must show that the cause which produced the result was one for which the employer was liable. It is not enough to show that the accident might have happened by reason of the employer's negligence when the same result might have occurred without any fault on its part; there must be at least some evidence to indicate it was in fault. This has not been shown; and there is nothing in the case upon which a jury could find that the wires

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were alive because of the defendant's negligence. Nor from the facts shown can any inference be drawn that the dangerous condition was caused by an employee for whose acts the master was responsible, as distinguished from the act of one for whose negligence, under the law, it was not responsible. See *Coin* v. *John H. Talge Lounge Co.* 222 Mo. 488; *Neal* v. *Chicago, Rock Island, & Pacific Railway*, 2 L. R. A. (N. S.) 905. The plaintiff, therefore, cannot recover under the second count.

The first count at common law alleges the defendant failed properly to warn and instruct the plaintiff. As has been said, he was an experienced lineman: he required no instructions concerning the danger of receiving a slight shock; nor was he entitled to a warning against the negligence of a fellow servant in turning on the current between Taunton and Quincy. *Siddall* v. *Pacific Mills, supra.* And see *Desautels* v. *Cloutier*, 189 Mass. 349; *Kelly* v. *Boston Elevated Railway*, 214 Mass. 461. He was entitled to a warning against an unknown danger; and if the wires became alive because the current was turned on in accordance with the rules of the defendant, it could be found that this was a peril unknown to him and he should have been instructed so that he could have guarded against it. The same difficulty arises under this count as under the second, — there was no evidence to show by whose act the wires became alive. It is true, upon the plaintiff's theory that the current could flow through these wires by the order or direction of a foreman or other servant having the authority to give this direction, in accordance with the defendant's "red tag" system, and in this way the potential might pass to the telephone wires; but unless this happened no warning was required. On the evidence it is just as probable that the wires became alive through the negligence of a fellow servant as by the negligence of a person having the right to order the current on. No breach of duty by the master, in failing to warn the servant of an unknown danger actually existing or which was likely to exist, is shown unless injury results from such danger, and there being no evidence as to the cause of the danger, the burden resting on the plaintiff has not been sustained. It follows that the plaintiff cannot recover under the first count.

The plaintiff also relied on two counts under the employers' liability act. As there was no evidence of a defect at common law,

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no defect in the ways, works and machinery under the statute (R. L. c. 106, § 71, cl. 1) appeared, *McCafferty* v. *Lewando's French Dyeing & Cleansing Co.* 194 Mass. 412, 415. Nor was there any evidence of negligence by the superintendent, Kehoe, who did everything required by the rules, and had no knowledge of the danger of which the plaintiff complains. Even if it be assumed that Brooks, the foreman in charge, was a statutory superintendent, the evidence does not show that he was negligent. He gave the order to shut off the power between Taunton and Fall River, and this was done; the line was short circuited as required by the rules, and he informed the plaintiff the lines were dead. He is not shown to have had any knowledge that a current would be induced into the wires by turning on the power north of Taunton. If such a danger existed and it was caused by the negligence of the defendant, there was a duty to warn the plaintiff. But it was the personal duty of the master, *Jarvis* v. *Coes Wrench Co.* 177 Mass. 170, and was not and could not be delegated to the superintendent so as to relieve the defendant itself of this responsibility. When Brooks told the plaintiff the wires were dead, there was no power in them — they were in fact dead — and they remained in this condition for some time. If they afterwards became alive, this did not happen because of any negligence of Brooks.

As there was no evidence to show negligence of the defendant at common law and there can be no recovery under the employers' liability act, it becomes unnecessary to consider the question of the plaintiff's due care in failing to use the safety belt, and the other questions raised at the trial.

Exceptions overruled.

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WILLIAM C. DOHERTY & another *vs.* AARON J. HARRIS.

Middlesex. March 11, 1918. — May 25, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Evidence, Hearsay, Best evidence, Market reports, Of value.

In this Commonwealth quotations of prices and market reports, compiled from statistics received from large dealers as to actual transactions in the open market published in a standard trade journal recognized by dealers as a reliable source of information, are not admissible as evidence of the value of the commodities whose prices are quoted therein when better evidence is obtainable and the parties who furnished the evidence to the trade journal can be called as witnesses.

CONTRACT for breach of an agreement for the sale of scrap iron to the plaintiff. Writ dated April 21, 1917.

In the Superior Court the case was tried before *King*, J. The material evidence and the only exception relied on by the defendant are described in the opinion. There was a verdict for the plaintiff in the sum of $3,721.73; and the defendant alleged exceptions.

W. D. Regan, for the defendant.

A. S. Howard, for the plaintiff.

CARROLL, J. In this action the plaintiff recovered damages for breach of a contract to deliver machinery cast iron. The defendant offered in evidence a copy of "The Commercial Bulletin," a trade journal published in Boston, which purported to contain market reports and quotations of prices of No. 1 machinery and No. 1 cast scrap iron for the week ending February 17, 1917, and quoted such iron at $21 per long ton, and also evidence to prove that "The Commercial Bulletin" is a standard publication recognized by dealers in metals as a reliable source of information, its reports being compiled from statistics received from large dealers in metals. This evidence was excluded. The iron in question was to be delivered in Lowell; "The Commercial Bulletin" was published in Boston; and although it showed the prices for this metal in Boston only, the paper could not be excluded on

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that ground as there was evidence from the defendant's experts — and apparently not disputed — that the fair market values of No. 1 machinery and of No. 1 cast scrap iron were the same in Lowell as in Boston.

While stock quotations and market reports, if shown to represent prices received in the open market and actual sales, are considered competent evidence of market values in some jurisdictions, see *Virginia* v. *West Virginia*, 238 U. S. 202, 213; *Mount Vernon Brewing Co.* v. *Teschner*, 108 Md. 158; *Aulls* v. *Young*, 98 Mich. 231, in this Commonwealth it is settled that they are not competent, however reliable the source from which the information is derived. They are hearsay evidence; and, when better evidence was obtainable and the parties furnishing the information could have been called, the quotations are not admissible. *National Bank of Commerce* v. *New Bedford*, 175 Mass. 257, 261. In the case at bar the defendant called two experts who gave evidence of the market value of the iron, and there was no intimation that there was any difficulty in securing witnesses who could testify to its value. Under these circumstances the evidence offered was inadmissible, and the judge was right in excluding it.

Exceptions overruled.

JOHN F. SAWYER, administrator with the will annexed, *vs.* OLD LOWELL NATIONAL BANK.

Middlesex. March 11, 12, 1918. — May 25, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Bailment. Bank. Will, Custody of.

Where one, who has hired a safe deposit box from a national bank and who also has a deposit account in the bank, leaves with the officials of the bank a tin box, without disclosing its contents, which is placed in a bank vault where books and records are stored, the bank does not become the bailee of a will of the depositor contained in the tin box.

Whether the remedy for the failure of a person having custody of a will to deliver such will into the Probate Court, which is given by R. L. c. 135, § 14, "to a person who is aggrieved for the damage sustained by him by reason of such neglect," is an exclusive remedy, here was referred to as a question that was not passed upon.

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It here was assumed for the purposes of decision, that an administrator *de bonis non* with the will annexed was the proper party to sue for damages suffered by the negligent withholding of the will.

Whether under the national bank act and before the passage of the federal reserve bank act, U. S. St. 1913, c. 6, § 11 k, a national bank had authority to accept a will for safe keeping and would be legally liable for a failure to deliver according to directions a will thus accepted in custody, here was referred to as a question which it was unnecessary to consider.

CONTRACT OR TORT by the administrator with the will annexed, appointed on March 14, 1910, of the estate of Sarah R. Spalding, late of Lowell, who died on April 6, 1902, against a national bank, the substituted declaration alleging in substance, in three different counts, that the plaintiff's testatrix, Sarah R. Spalding, during her lifetime deposited or caused to be deposited with the defendant for safe keeping a certain box or tin trunk with her name marked upon it and containing among other things her last will and testament; that the defendant accepted the custody of said box and thereby impliedly promised and agreed to deliver it over upon and in accordance with the request of Sarah R. Spalding or her legal representatives; that Sarah R. Spalding died on April 6, 1902; that after the lapse of a reasonable interval of time, during which no will of Sarah R. Spalding was found notwithstanding an extended search therefor, an administrator of her estate was appointed by the Probate Court, who visited the banking rooms of the defendant and there made demand for such boxes or papers belonging to Sarah R. Spalding as were in the custody and possession of the defendant; that the defendant thereupon produced and delivered to the administrator certain boxes belonging to the deceased, but, in alleged disregard and violation of its obligation, the defendant failed to produce or deliver the box containing her last will and testament; that the administrator thereafter administered the estate of the deceased and distributed among her next of kin the sum of $28,803.27, and on June 7, 1905, his final account as such administrator was allowed by the Probate Court; that continuously thereafter from the time of the demand aforesaid, still in alleged disregard and violation of its obligation, the defendant failed to produce or deliver the box containing the last will and testament until the early part of February, 1910, when the defendant found in its vault the box or tin trunk above mentioned containing the last will and testament of the deceased,

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and, the executor named therein having died, the plaintiff was appointed administrator with the will annexed; that none of the next of kin among whom the estate had been distributed was named as a legatee in the will, wherefore the plaintiff made diligent effort to recover back the amounts so paid to the next of kin; that, while a portion thereof has been recovered, the plaintiff has been unable to recover the whole, whereby the legatees named in the will have suffered loss; that such loss was due to the negligence of the defendant, its officers or servants, in failing to find as above set forth said box containing the last will and testament, wherefore a right of action accrued to the plaintiff to recover damages from the defendant. Writ dated January 15, 1916.

The defendant filed a plea in abatement and also filed a demurrer. There were hearings on both before *Keating*, J., who made orders respectively overruling the plea in abatement and the demurrer and ordering the defendant to answer, which it did.

Later the case was tried before *Morton*, J., without a jury. The material facts as testified to by the plaintiff's witnesses are stated in the opinion. At the close of the plaintiff's evidence the judge ordered a verdict for the defendant and reported the case for determination by this court, with a stipulation of the parties that, if the judge was right in ordering the verdict, judgment should be entered on the verdict for the defendant; and that, if the judge was wrong in ordering the verdict, the case should be remanded to the Superior Court to be tried before a jury for the assessment of damages only. The orders of *Keating*, J., overruling the plea in abatement and the demurrer also were reported for determination by this court.

R. L. c. 135, § 14, referred to in the opinion, is as follows: "A person who has the custody of a will, other than a register of probate, shall, within thirty days after notice of the death of the testator, deliver such will into the probate court which has jurisdiction of the probate thereof, or to the executors named in the will, who shall themselves deliver it into such court within said time; and if a person neglects without reasonable cause so to deliver a will, after being duly cited for that purpose by such court, he may be committed to jail by warrant of the court until he delivers it as above provided; and he shall be further liable to a

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person who is aggrieved for the damage sustained by him by reason of such neglect."

F. E. Dunbar, (*A. C. Spalding* with him,) for the plaintiff.

J. J. Kerwin, (*J. C. Reilly* with him,) for the defendant.

DE COURCY, J. Sarah R. Spalding died on shipboard on April 6, 1902, while returning from Jamaica. Shortly thereafter a search was begun for a will which it was known she had at one time executed. One Charles H. Coburn called at the banking rooms of the defendant, where Miss Spalding had hired a safe deposit box and kept a deposit account. He had the key of the safe deposit box, and its contents were examined in his presence, but no will was found therein.

Mr. Coburn was duly appointed administrator of Miss Spalding's estate on May 27, 1902. He administered the estate, had his final account allowed on May 25, 1905, and distributed the personal estate among the next of kin in pursuance of a decree issued by the Probate Court on June 7, 1905.

In February, 1910, two clerks in the employ of the defendant were engaged in removing from the bank vault certain old books and records, preparatory to installing new steel shelving. On the floor, under one of the old shelves, they found a rectangular tin box, about twelve inches long, seven inches wide, and six or seven inches deep. The name Sarah R. Spalding was scratched thereon in two or three places; and when the box was opened there was found therein the will of Miss Spalding, and some other papers and family "keepsakes" of no intrinsic value. The president of the bank filed the will in the probate office, and notified the attorney who had acted for Mr. Coburn. This will was duly allowed on March 14, 1910, and the plaintiff was appointed administrator with the will annexed. He brought this action of tort or contract to recover damages, claiming among other elements, the expenses incident to the administration, and the value of the real estate which had been sold by the heirs of Miss Spalding before the finding of her will.

The case declared on, and tried in the Superior Court, was the alleged breach of duty by the defendant, as bailee, in failing to produce or deliver the box containing the last will of Sarah R. Spalding. We assume, for the purposes of this case, that the plaintiff is a proper party to sue in the right of the testatrix for some

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of the elements of alleged damage; and that the remedy provided by R. L. c. 135, § 14, in favor of persons aggrieved by the unreasonable neglect of the possessor of a will to deliver it into the Probate Court, is not exclusive. Nevertheless the plaintiff has failed to establish the essential fact, that the defendant ever became the bailee of the will. Presumably it could be inferred from the evidence that the tin box was left at the bank for safe keeping: but there is nothing in the record to indicate that the defendant knew or reasonably ought to have known that Miss Spalding's will was contained in it. Acceptance of the box would not make the bank responsible for its contents. As was said in *Scollans* v. *Rollins*, 179 Mass. 346, 354, where a sealed envelope containing bonds was delivered, " . . . if the certificates had been handed to him in a sealed envelope, they would not have been entrusted to him, and opening the envelope would have been like a carrier's breaking bulk. The modern decisions have followed the ancient suggestion that in such cases there is no delivery of the contents of the enclosure." See also *Belknap* v. *National Bank of North America*, 100 Mass. 376, 381.

As the defendant never became custodian of the will of Miss Spalding, it is unnecessary to consider whether it would be authorized, under the national bank act, to accept a will for safe keeping, and would be legally liable for the consequences due to its failure to deliver the will according to directions. See *Myers* v. *Exchange National Bank*, 96 Wash. 244; *Dresser* v. *Traders' National Bank*, 165 Mass. 120. And see now federal reserve act, U. S. St. 1913, c. 6, § 11 k. *First National Bank* v. *Union Trust Co.* 244 U. S. 416.

The plaintiff, in his supplemental brief, argues that the defendant bank was bailee of the tin box, as distinguished from its contents. It is apparent from the record, however, that the bailment claimed in the pleadings and at the trial was that of the will; and the damages contended for could not arise from the loss of the box itself. Even if the question were now open to the plaintiff, it is difficult to see how an empty tin box, gratuitously stored in the bank vault for the accommodation of the owner, could be regarded as a "special deposit," the handling of which would come within the regular line of banking business, like money, stocks, bonds and other securities. *American National Bank* v. *E. W.*

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Adams & Co. 44 Okla. 129; L. R. A. 1915 B 542, note. *Foster* v. *Essex Bank*, 17 Mass. 479.

The plea in abatement and demurrer have not been argued by the defendant, and the issues raised thereby are disposed of by what we have said. The exclusion of evidence offered by the plaintiff on the question of damages has become immaterial in view of our decision on the issue of liability. *Millen* v. *Gulesian*, 229 Mass. 27. The trial judge rightly ordered a verdict for the defendant: and in accordance with the report judgment is to be entered on the verdict.

So ordered.

ANDREW SCHLEHUBER, administrator, *vs.* AMERICAN EXPRESS COMPANY.

Suffolk. March 13, 1918. — May 25, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, & PIERCE, JJ.

Agency, Existence of relation, Scope of employment. *Negligence*, Employer's liability, In loading truck.

At the trial of an action by an administrator against an express company, which was not a subscriber under the workmen's compensation act, for personal injuries and death of an employee of the defendant caused by a barrel falling upon him as he and a second man were loading it upon a truck, there was evidence that the barrel fell by reason of negligence of the second man. From evidence, admitted under R. L. c. 175, § 66, it appeared that the intestate had made a statement to one witness which described the negligent workman as "a fellow . . . that does lumping around there," who "helped" the deceased "put on a barrel of fish from a truck on to the car, the day before the Fourth." To another witness, regarding the same man, the intestate had stated that on the day of the accident there was "working with him" another man whose name he did not know, who did not work steadily, that he "worked sometimes a day and sometimes again later he would work another day." To a third witness the intestate had spoken of the man as "a lumper" who was working with him. There was other evidence that, in a rush of business at that season an agent of the defendant had authority to and did employ extra "lumpers" to aid in handling heavy boxes and barrels. *Held*, that findings were warranted that the man whose negligence caused the injury and death of the plaintiff's intestate was at that time in the defendant's employ and acting within the scope of his employment.

TORT for personal injuries and death of the plaintiff's intestate alleged to have resulted from a barrel falling upon him when, as an

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employee of the defendant, he was loading it on to a truck. Writ dated June 28, 1916.

In the Superior Court the case was tried before *Hall*, J. The injury was received on July 3, 1915. He died on December 12, 1915, of cancer, and there was conflicting evidence on the question whether his death was caused by his injury. Other material evidence is described in the opinion. At the close of the evidence the defendant moved that a verdict be ordered in its favor. The motion was denied. The jury found for the plaintiff in the sum of $5,700; and the defendant alleged exceptions.

A. M. Pinkham, (*A. L. West* with him,) for the defendant.

J. W. McAnarney, (*T. F. McAnarney* with him,) for the plaintiff.

De Courcy, J. The plaintiff has recovered a verdict on the count at common law for the conscious suffering of his intestate, Joseph Schlehuber. The only question before us is whether the trial judge should have ordered a verdict for the defendant.

The intestate was in the employ of the defendant on July 3, 1915. The only evidence that he sustained an injury on that day in the course of his work consisted of declarations made by him to others and introduced in evidence under R. L. c. 175, § 66. But as the jury believed this testimony, we must assume that the declarations were made, and were true. The defendant was not insured under the workmen's compensation act; consequently it was no defence to the plaintiff's case that Joseph Schlehuber himself was negligent, or that he assumed the risk, or that the injury was caused by the negligence of a fellow employee. St. 1911, c. 751, Part I, § 1.

According to the declarations of the deceased, he was working for the defendant at the North Station in Boston, and with another man was lifting a barrel of fish from a truck into a car, when the barrel in some way was pushed against him, and he sustained injuries which later proved to be fatal. It is strongly urged by the defendant that, even accepting the truth of said declarations, there was no evidence that the fellow workman was an employee of the defendant, or was acting within the scope of his employment, or that he was negligent.

The evidence bearing on each of these elements was meager; but it was enough to be submitted to the jury. For instance, the witness Ochs testified that Joseph in telling how the accident hap-

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pened, said, " . . . 'there was a fellow' . . . 'that does lumping around there,' . . . 'he helped me put on a barrel of fish' . . . 'from a truck on to the car, . . . the day before the Fourth. And in lifting up the barrel, he took hold one side and I took hold of the other. He got it practically up to the entrance, to the door of the car, and I told him to wait a minute until I got a good hold to give it a high boost. In fact, he lifted before I did and threw the barrel over on to me. It went down, and I struck up against the truck, struck me in the back here . . . .'" He said to Thomas G. Connolly, his attorney, that "he had been employed at that time by the American Express Company, and also working with him on that day at the time of the accident was another man. He could n't — he never had learned the name of the other man. He said the other man did n't work steadily, he worked sometimes a day and sometimes again later he would work another day. . . . He said that . . . they were loading a barrel of fish from an electric truck on to a car that was going up to Fitchburg and Albany. The two of them got hold of this barrel of fish and canted it over on its edge. Then he said to the other man, 'Now hold it while I get a better grip, or purchase' — I don't know whether he said grip or purchase, . . . So the other man held it, and he let go; and as he was preparing to get this other hold or purchase, the other man lunged forward on it, and shoved him, the plaintiff, against what he called the ell of the truck." One Boegner testified that the intestate said to him, "' . . . I had an accident.' . . . 'A lumper and I lifted a barrel from the truck to the car down at the North Station, and while we were lifting, that fellow shoved the barrel over on to me.' . . . 'The darn fool shoved the barrel over on to me and then let go.'" In addition to this and like testimony the jury could infer that in the rush of express business on the day before the Fourth of July the defendant would be likely to need and to hire extra "lumpers" to aid in the handling of heavy boxes and barrels. Admittedly the only persons authorized to employ help were the agent French and his assistants. *Davis* v. *Boston Elevated Railway*, 222 Mass. 475, 479. *Robinson* v. *Doe*, 224 Mass. 319.

On the evidence the jury could also find that the injury to the plaintiff was caused by the carelessness of this fellow employee in the course of his employment, that is while doing the usual work

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of a "lumper" or helper. *D'Addio* v. *Hinckley Rendering Co.* 213 Mass. 465. *Heywood* v. *Ogasapian*, 224 Mass. 203.

It is conceded that there was evidence for the jury that the cancer, from which the intestate died, resulted from the accident.

Exceptions overruled.

CHARLES H. DUDLEY *vs.* WILLIAM H. WYE.

Norfolk. March 18, 1918. — May 25, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Contract, Performance and breach.

In an action for breach of a contract to manufacture and deliver to the plaintiff one hundred and fifty dozen of Shaker knit sweaters of seven specified styles for about $9,000 in all, in which the defendant relied on the defence that he was warranted in cancelling the plaintiff's order by reason of a breach of the contract on the part of the plaintiff, it appeared that before undertaking this contract the defendant had had no dealings with the plaintiff and knew nothing of his financial ability, that the goods to be manufactured for the plaintiff were of a special kind not commonly found on the market, that the work necessitated a considerable outlay for stock and labor and that the defendant was not to be paid for several months, that when the defendant took the order he told the plaintiff that "if he did not live up to his agreement the defendant would drop it," that the contract afterwards was modified by an agreement to include in it orders for eight white and twenty green sweaters to be made and delivered at once, that these twenty-eight sweaters were made and delivered promptly and payment, when due, was demanded, the price amounting to $127.50, that about a month after the payment became due the plaintiff paid $123.67 and about three weeks later paid the balance of $3.83, that in response to a request for payment nine days before the first payment was made the plaintiff had written, "I will send check now within a very few days. Weather conditions up in this part of the country during April have been frightful, putting business and collections in very bad shape," and that at the time of his first payment the plaintiff wrote "with reference to these first small invoices, I laid them out nearly three weeks ago for payment and through an oversight they became mislaid," and in paying these bills when long overdue the plaintiff deducted the discount to which he would have been entitled only on making the payments promptly. The judge, who heard the case without a jury, found that the plaintiff broke his contract in failing to pay for the twenty-eight sweaters when the price was due and ruled that this breach of contract was important enough to excuse the defendant from further performance of the contract on his part. Accordingly the judge found for the defendant. *Held*, that the finding of the judge, which was in substance that the promise of prompt payment for goods as delivered was an essential inducement to the defendant to enter into

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the contract, was warranted and that upon this finding his ruling that the plaintiff's breach went to the root of the contract and justified the defendant in cancelling the rest of the order was correct.

CONTRACT to recover damages for breach of a contract to manufacture and deliver to the plaintiff one hundred and fifty dozen sweaters of specified styles, colors and sizes at specified prices, the order for the sweaters having been accepted by the defendant on February 14, 1916, and the times fixed for delivery being in July, August and September, 1916. Writ dated November 6, 1916.

In the Superior Court the case was referred to an auditor, who filed a report, which concluded as follows: "Should the court be of opinion, upon the evidence hereinbefore set forth, that the defendant, by reason of the failure of the plaintiff to make prompt payment of the bills of March 9 and 11, was justified in refusing to proceed with the contract, then my finding would be for the defendant."

Later the case was heard by *Hammond*, J., without a jury, upon the auditor's report and oral testimony.

The plaintiff asked the judge to make the following rulings:

"1. On all the evidence the plaintiff is entitled to recover.

"2. On the findings of fact of the auditor's report and on the evidence reported by him, judgment should be for the plaintiff."

"5. On all the evidence the defendant was not justified in refusing to perform his contract with the plaintiff.

"6. On the material evidence as reported by the auditor the defendant was not justified in refusing to perform his contract with the plaintiff."

"8. The orders of February 26 and March 6, 1916, from the plaintiff to the defendant filled March 9 and 11 respectively were contracts separate and distinct from the contract made February 14, 1916.

"9. There was no such delay in payment of the shipments of March 9 and 11 as justified the defendant in refusing to perform his contract made February 14, 1916.

"10. Even if there had been unreasonable delay in payment of the shipments of March 9 and 11, those shipments were not in execution of the contract here sued on and the plaintiff's right of recovery is not affected thereby.

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"11. The defendant, having agreed in February, 1916, to furnish the plaintiff the goods in question upon terms of credit, was not entitled on the evidence to require a deposit or guarantee or prepayment by the plaintiff in May, 1916, as a condition precedent to the performance of his contract.

"12. There is no evidence that the plaintiff was not financially able to perform his contract with the defendant.

"13. There is no evidence of facts on which the defendant could reasonably believe that the plaintiff was not financially able to perform his contract with the defendant.

"14. The plaintiff furnished the defendant all the assurances of financial responsibility that the circumstances called for or that the defendant reasonably requested prior to the defendant's refusal to perform his contract."

The judge refused to make any of these rulings. He made the findings and the ruling which are stated in the opinion and found for the defendant. The plaintiff alleged exceptions.

W. T. Atwood, for the plaintiff.

G. V. Phipps, for the defendant.

DE COURCY, J. This action was brought to recover damages for failure of the defendant to manufacture and deliver to the plaintiff a lot of Shaker knit sweaters; and the trial judge found for the defendant. The original contract, made on February 14, 1916, was for one hundred and fifty dozen, made up of seven specified grades, embracing different sizes and colors, deliveries to be in July, August and September. The terms of the sale were thirty days' credit with a discount of three per cent on bills paid within ten days. Subsequently orders were given for eight white and for twenty green sweaters, to be made and delivered at once; and these were delivered on March 9 and 11. Certain correspondence followed, and the defendant on May 9 notified the plaintiff to "consider the order for Fall cancelled."

1. The judge specifically found that the contract of February 14 was modified by an agreement that the eight white and twenty green sweaters ordered later should be deemed to be a portion of the one hundred and fifty dozen sweaters called for by that original order. In our opinion there was evidence in the correspondence between the parties to warrant the finding. Before these orders were sent (February 28 and March 6) the plaintiff had been

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notified by the defendant that no more orders could be taken at the old prices, and an order sent on February 25 had been returned. On March 7 the plaintiff expressly wrote the defendant to "take these [the green sweaters] from my summer order." In the defendant's reply appears, " . . . I absolutely refuse to accept any more orders. . . . I will make the two orders for you, the White and the Green, and shall deduct them from the original order." The plaintiff expressed no dissent from this, and these sweaters were made, delivered and accepted.

The plaintiff, having failed to sustain his contention that the orders filled on March 9 and 11 were separate and distinct from the contract of February 14, now argues that these two items, even if considered as part of the original contract as modified, are severable from the original order. No such question of the divisibility of the contract appears to have been raised by the plaintiff before the auditor or the trial judge. But, assuming that this contention were open, it would not avail the plaintiff under the findings of the court. There were seven different styles of sweaters specified in the original order, each style number indicating a certain weight and grade of garment. The twenty-eight special sweaters did not correspond with any of the seven kinds. While it was agreed, that they should be regarded as a part of the modified original contract, the parties did not specify which of the seven styles they should be considered as taken from. They could only be taken from the contract as a whole; and the contract as modified was an entire one. A failure of part of the consideration, regarded as the inducement to enter into the contract, was a failure of the whole. *Mersey Steel & Iron Co.* v. *Naylor, Benzon & Co.* 9 App. Cas. 434. *Norrington* v. *Wright,* 115 U. S. 188. Cases like *Barlow Manuf. Co.* v. *Stone,* 200 Mass. 158, involving separable contracts, are not applicable.

2. The trial judge also found that "under this contract as so modified the sum of $36.67 became due on April 9, 1916, for the white sweaters and the sum of $90.83 on April 11, 1916, for the green sweaters; and that the plaintiff broke his contract in that he failed to pay these amounts until May 6, 1916, when he paid $123.67 and May 24, 1916, when he paid the balance $3.83." Plainly this finding was warranted by the evidence.

3. Upon the facts as found the judge ruled, that the plaintiff's breach of the contract was important enough to excuse the de-

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fendant from further performing the contract; and therefore found for the defendant.

In determining whether the defendant was justified in cancelling the plaintiff's order on May 9, 1916, and refusing further to perform the contract it is important to view the facts then existing. Before the order of February 14, 1916, there had been no business dealings between the parties. The defendant's production of Shaker sweaters was only about twenty-five dozen per week. He knew nothing of the plaintiff's financial ability. According to his testimony he told the plaintiff that "the only reason he was open for more business was because he was dissatisfied with the people with whom he had been doing business; that if he did business with the plaintiff his terms would have to be strictly 3/10 net 30; that he would not do business under any other conditions." And again that "if he did not live up to his agreement the defendant would drop it regardless of the result." The bill for the first shipment, $36.67, was not paid when it became due April 9. Nor was the second, for $90.83, which became due on April 11. In response to the defendant's request (April 27) for payment the plaintiff wrote: "Will send check now within a very few days. Weather conditions up in this part of the country during April have been frightful, putting business and collections in very bad shape." Later the excuse given for the delay was (May 6) "with reference to these first small invoices, I laid them out nearly three weeks ago for payment and through an oversight they became mislaid." When the plaintiff sent a check (May 6) to pay the long overdue accounts he deducted the discount, to which he was not entitled.

The trial judge aptly summed up the situation as follows: "When the defendant wrote his letter of May 5, he was in this position. He was about to begin manufacturing for the plaintiff nine thousand dollars' worth of goods of a special kind not commonly found on the market, for which he was not to be paid for several months. The work necessitated a considerable outlay for stock and labor. The plaintiff was nearly a month in default in paying two small bills for the first instalment of goods and had written (apparently about a week before) promising to 'send check now within a very few days' and excusing the delay on the ground that weather conditions had been bad 'putting business and col-

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lections in very bad shape.' Under these circumstances the defendant well might have thought that the plaintiff was obliged to rely on his collections to raise the money to pay a bill of $127 and that this default boded ill for the security of future payments. It cannot be fairly said I think that this breach was of such slight importance as to require the defendant, under circumstances justly warranting an inference that the plaintiff was hard up, to proceed with his contract and assume the risk of loss, the possibility of which was made evident by this default. The plaintiff was a trader and his failure to pay these small bills promptly under circumstances indicating difficulty in raising the money gave an importance to such breach quite out of proportion to the actual amount involved. I must believe that the promise of prompt payments was a material and important inducement to the defendant to make the contract."

In substance the judge has found that the promise of prompt payment for goods as delivered was an essential inducement to the defendant to enter into the contract. As it is often expressed, the plaintiff's breach went to the root of the contract, or to the whole consideration. While the case is close, we are of opinion that the ruling of the judge was correct in view of his findings of fact. As was said by this court in a similar case: "In such a state of things it can fairly be said that justice did not require the seller to continue to deliver goods, but that the default of the buyer was so serious and so far connected with the substance or consideration of the contract as to justify the seller in refusing to be further bound by it." *Eastern Forge Co.* v. *Corbin*, 182 Mass. 590, 593. *National Machine & Tool Co.* v. *Standard Shoe Machinery Co.* 181 Mass. 275. Morison, Principles of Rescission of Contracts, 55, 56, 89.

What has been said disposes of all the questions raised by the plaintiff's requests and not rendered immaterial by the findings of fact.

Exceptions overruled.

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WILLIAM J. SPINNEY *vs.* THOMAS FREEMAN.

Suffolk. March 19, 1918. — May 25, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Limitations, Statute of.

In an action for the price of goods sold and delivered, in which the statute of limitations was pleaded, it appeared that after a running account had existed between the plaintiff and the defendant, on which a balance was due to the plaintiff, the transactions between them ceased for four years and then were resumed, when the plaintiff said to the defendant, "You must not let the old account increase, but must pay for your goods as you buy them," and that thereafter during a period of seven months "the defendant did pay for each bill of goods as bought or shortly thereafter and intended that his payments should be applied on said purchases and not on the purchases of the first period of trading and that the plaintiff intended likewise and so applied them." The writ was dated more than six years after the last item on the old account. "At the time of the trial . . . it was discovered that the credits of the second period of trading exceeded the debits by seventy-five cents." The plaintiff claimed the right to apply this accidental over-payment to the old account and thus create a payment which would take that account out of the statute of limitations by which otherwise it was barred. *Held*, that the plaintiff did not have this right, as the defendant had not intended to make a payment on the old account, and that recovery of the balance due on the old account was barred by the statute.

CONTRACT on an account annexed for a balance of $228.62 alleged to be due for the price of goods sold and delivered by the plaintiff to the defendant. Writ in the Municipal Court of the City of Boston dated January 24, 1916.

The defendant's answer contained an allegation "that the cause of action mentioned in the plaintiff's writ and declaration did not accrue within six years before the suing out of the plaintiff's writ."

The evidence at the trial in the Municipal Court is described in the opinion. The first running account between the plaintiff and the defendant, there mentioned, was from May 31, 1907, to November 20, 1908, when there was a balance due to the plaintiff, the last credit item being dated May 6, 1909. On October 8, 1913, the trading between the parties was resumed in the manner described in the opinion. From October 8, 1913, there were almost

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continuous transactions between the parties until the last purchase on May 29, 1914. The report states that "At the time of the trial, when the amended declaration was allowed, it was discovered that the credits of the second period of trading exceeded the debits by seventy-five cents." The plaintiff asked the judge to make the following rulings:

"1. On all the evidence the plaintiff is entitled to recover.

"2. That the defendant must be held to have intended the full effect of the payment of seventy-five cents upon whichever debt the creditor intended to apply it."

"7. The payment by the defendant of a sum greater by seventy-five cents than the balance of the later part of the account in the absence of any fact tending to show that the defendant intended a different application gave the plaintiff the right to apply said payment on the earlier part of the account.

"8. The payments made by the defendant were not made on any part of the account existing between the parties, but were made to be applied to the whole account."

The judge refused to make any of these rulings, and made the finding which is quoted in the opinion. He found for the defendant and at the request of the plaintiff reported the case to the Appellate Division. The Appellate Division made an order that the report be dismissed; and the plaintiff appealed.

F. W. Doring, (*F. Killam* with him,) for the plaintiff.

J. W. Rorke, (*S. L. Webb* with him,) for the defendant.

De Courcy, J. When the parties entered on their second period of trading, on October 8, 1913, the plaintiff said to the defendant, "You must not let the old account increase, but must pay for your goods as you buy them." From that time there were almost continuous transactions between the parties, the last purchase being on May 29, 1914. The trial judge has expressly found "that the defendant did pay for each bill of goods as bought or shortly thereafter and intended that his payments should be applied on said purchases and not on the purchases of the first period of trading and that the plaintiff intended likewise and so applied them." At the time of the trial, when the amended declaration was allowed (April 7, 1916), it was discovered that the credits of the second period of trading exceeded the debits by seventy-five cents.

The first running account ended on November 20, 1908, when

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there was a balance due the plaintiff; and the last credit thereon was on May 6, 1909. It was almost seven years later when the parties discovered the overpayment on the second account, which apparently was made by error and mistake. Assuming that the plaintiff had a right to retain this seventy-five cents, his application of it to the old account, already barred by the statute of limitations, would not renew that account. In order to take the debt out of the operation of the statute, such appropriation must be specifically made or directed by the debtor. *Pond* v. *Williams*, 1 Gray, 630. *Wenz* v. *Wenz*, 222 Mass. 314. *Kennedy* v. *Drake*, 225 Mass. 303, 308, and cases cited.

It is urged by the plaintiff that the unintended overpayment may be considered as applied to the first account at the time when it was made, and the running of the statute thereby arrested. But a conclusive answer to this contention is, that whenever this was received by the plaintiff it was intentionally applied by him to the second account. Such too was the intention of the defendant, who had a right to direct the application of the payments made by him. *Ramsay* v. *Warner*, 97 Mass. 8. The plaintiff never attempted to alter that application; nor could he have done so except with the consent of the defendant. *Plummer* v. *Erskine*, 58 Maine, 59. *Coon's Appeal*, 52 Conn. 186. *Smith* v. *Wood*, Saxton, 74. 30 Cyc. 1239, and cases cited.

In view of the findings of fact made by the trial judge there was no error in denying the plaintiff's first, second, seventh and eighth requests, and finding that the account sued on was barred by the statute of limitations.

Order dismissing report affirmed.

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JOSEPH SKOLNICK *vs.* ISAAC H. GREENBURG & others.

Essex. March 20, 1918. — May 25, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Partnership. Equity Jurisdiction, For an accounting, To redeem from mortgage. *Equity Pleading and Practice,* Bill.

A bill in equity, which alleges that the plaintiff and two of the defendants entered into a partnership agreement to conduct theatrical entertainments and moving picture exhibits in a building erected by them on certain land belonging to the three, subject to certain mortgages, that such partnership business thereafter was conducted and that the two defendants refused to render a proper account of the moneys received by them in connection with the alleged partnership business, and prays for a partnership accounting, although the allegations are vague and general, will be upheld on demurrer as stating a ground for relief against the two defendants.

Where the bill above described joined another defendant, who was alleged to hold title to two undivided thirds of the real estate in trust for the two defendants alleged to be partners, but there was no allegation that the real estate was any part of the partnership assets legal or equitable, it was *held* that no case was set out connecting the third defendant with the partnership and that as to the third defendant the bill should be dismissed.

In the case above described a certain paragraph in the bill, to which the defendants specially demurred on the ground of indefiniteness, was *held* to be bad because it did not intelligibly inform the defendants what charges they were to answer.

The bill described above alleged that the real estate, in which the plaintiff had an undivided third interest, was subject to four successive mortgages, that the fourth mortgage was held by one of the defendant partners to whom the three preceding mortgages had been assigned, and that this defendant had taken possession of the real estate under these mortgages or one of them and had received the rents and profits. The bill contained an offer of the plaintiff to pay what might be found to be due upon the mortgages and a prayer for an order of redemption. *Held,* that by the express terms of R. L. c. 187, § 22, the plaintiff could begin a suit for redemption without a previous tender.

In the suit in equity above described one of the causes assigned for demurrer was multifariousness. The bill alleged that the fourth mortgage held by one of the defendant partners was a partnership asset and that the other of the two defendant partners was the mortgagee named in the third mortgage and as a part of the consideration for that mortgage was to pay off the first and second mortgages. *Held,* that, in view of these allegations, the two subjects of the partnership accounting and the redemption of the real estate from the mortgages seemed sufficiently connected with one another to allow their joinder in one bill.

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BILL IN EQUITY, filed in the Superior Court on September 6, 1917, containing the allegations which are described in the opinion, and praying that the defendant Greenburg be enjoined from assigning or foreclosing the mortgages held by him upon certain real estate on Western Avenue in Lynn in which the plaintiff claimed an undivided third interest subject to certain mortgages, that a receiver be appointed to collect the rents and profits of the mortgaged real estate and to conduct the business of theatrical entertainments and moving picture exhibits in a building on the real estate, that an account be taken of the principal and interest due on each of the mortgages to which the real estate was subject, that an account be taken of the rents and profits of the real estate and of the sums received by the defendants Greenburg and Standard, and that the plaintiff, on paying to the defendants such sums as they might be entitled to under their mortgages, should be given possession of the premises discharged from the mortgages, and for further relief.

The fifteenth paragraph of the bill, held by this court to be bad for indefiniteness, was as follows:

"15. The plaintiff avers that there is a mutual agreement by and between the plaintiff and the defendants Greenburg and Standard to the effect that, whatever title in said real estate either by way of mortgage or otherwise any of said partners has, shall be considered first as security for the sums that have been advanced by them respectively in the purchase of said real estate, or in carrying on said business, and for services performed in connection with said business, and secondly as belonging to said partners in the proportion of one third to the plaintiff and two thirds to the defendants Greenburg and Standard."

Each of the defendants demurred to the bill, alleging, first, want of equity, second, multifariousness and, third, demurring specially to the fifteenth paragraph of the bill as indefinite and inadequate.

The case was heard on the demurrers by *Wait*, J., who made an order sustaining the demurrers with leave to the plaintiff to amend his bill within ten days, and, the plaintiff having made no amendment of his bill within that time, by order of the judge a final decree was entered dismissing the bill. The plaintiff appealed.

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N. D. A. Clarke, for the plaintiff.

R. T. Parke, (*I. H. Greenburg* with him,) for the defendants.

DE COURCY, J. The main purposes of the bill are to obtain a partnership accounting and the redemption of the plaintiff's real estate from certain mortgages. The first ground stated in the demurrers is want of equity. This must be overruled if the bill sets out facts calling for equitable relief. *Conant* v. *Warren,* 6 Gray, 562. *Bliss* v. *Parks,* 175 Mass. 539, 543.

1. As to the partnership: it is alleged that the plaintiff and the defendants Greenburg and Standard, on July 6, 1916, "entered into a copartnership agreement whereby they were to conduct theatrical entertainments and exhibit moving pictures in a building erected by them on said premises and were to lease portions of said building for their mutual benefit, and they have since that time been conducting said business as said partners." It is further alleged that these two defendants have refused to render a proper account of the moneys received by them in connection with the alleged partnership business. Although these allegations are vague and general, and may well call for specifications before an answer is filed, we cannot say that the bill fails to state any ground for a partnership dissolution and accounting as against the defendants Greenburg and Standard. *Ferry* v. *Henry,* 4 Pick. 75. *Field* v. *Craig,* 8 Allen, 357. As against the defendant Rhoda Isenburg no case is set out which connects her with the partnership allegations. It is stated that she holds her title to the real estate in trust for the other defendants; but the bill does not allege that the real estate is any part of the legal or equitable assets of the alleged copartnership.

2. The fifteenth paragraph is too general and indefinite, and is insufficient to intelligibly inform the defendants what charges they are to answer. The special demurrer was rightly sustained, and the plaintiff failed to avail himself of the leave granted him to amend.

3. When this bill was filed (September 6, 1917) the title to the parcel of land in Lynn was as follows: The plaintiff owned an undivided one third interest, and Rhoda Isenburg two thirds, in the equity of redemption. The first mortgage, for $4,000, dated March 31, 1916, and payable in six months, was almost a year overdue. The second, for $1,500, dated April 15, 1916, and pay-

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able in ninety days, was more than a year overdue. The third was for $23,000, also dated April 15, 1916, payable in six months, with interest at twelve per cent. This was almost eleven months overdue. The fourth was for $15,000, dated September 16, 1916, payable on demand, with interest at twelve per cent payable monthly. The defendant Greenburg was the mortgagee named in the last mortgage, and was assignee of the earlier ones. There is no allegation that the plaintiff has paid any money on account of these mortgages. It is stated, "the defendant Greenburg has taken possession under said mortgages or one of them . . . and has received the rents and profits of them;" but it does not appear when possession was taken, or whether a substantial amount of rent has been collected. However, as the plaintiff alleges that he offers to pay what shall be found due under said mortgages, he is permitted by the express terms of R. L. c. 187, § 22, to commence a suit for redemption without a previous tender. As the mortgagee had published notices of sale under the powers in the first and fourth mortgages before the commencement of the suit, and the amount due was not paid into court nor the sale enjoined, the statute authorized him to proceed with the sales. Sections 21 and 22 were drafted to conform to the decisions in *Way* v. *Mullett*, 143 Mass. 49, and *Clark* v. *Griffin*, 148 Mass. 540. See Commissioners Report on Pub. Sts. c. 187, note.

The demurrer of the defendant Rhoda Isenburg was sustained rightly. The demurrers of the other defendants presumably were sustained for multifariousness, as the plaintiff has joined in one suit an application to redeem mortgages held by the defendant Greenburg and a claim against Greenburg and Standard for a partnership accounting. But in view especially of the allegations of paragraph 14, in substance that said fourth mortgage is a partnership asset; and the allegations of paragraph 11, that the defendant Standard, the mortgagee named in the third mortgage, as part of the consideration was to pay off the first and second mortgages; the two subjects seem sufficiently connected with one another to allow their joinder in one bill. *Ginn* v. *Almy*, 212 Mass. 486, 493. *Lovejoy* v. *Bailey*, 214 Mass. 134, 151. *Digney* v. *Blanchard*, 226 Mass. 335.

It follows that the decree dismissing the bill as to Rhoda Isenburg must be affirmed, with costs. The decree dismissing the

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bill as to the defendants Greenburg and Standard is to be reversed, and their demurrers overruled; except the special demurrer to paragraph fifteen, which is to be sustained.

Decree accordingly.

MARY SUGHRUE *vs.* BAY STATE STREET RAILWAY COMPANY. TIMOTHY D. SUGHRUE *vs.* SAME.

Middlesex. March 20, 1918. — May 25, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Negligence, Of custodian of child, Street railway.

In an action against a street railway company for personal injuries received by a child two and one half years of age, it *was assumed* that St. 1914, c. 553, was not applicable.

A child two and a half years of age lived with her parents, who had no servant, in a house facing on a street, upon which was a street car line, and also facing a sea beach, which was somewhat more than one hundred feet beyond the street and which could be seen from the front piazza of the child's home through a space of twenty-nine feet between two cottages on the other side of the street. At about eight o'clock in the morning of a day in July, the child's mother gave her into the charge of a sister, thirteen and one half years of age and a high school pupil, who was accustomed to her care, to take her to the beach to play with the mother's two other children. The sister, having enjoined the child to stay where she was on the beach, went to take one of the other children from near some eel grass, turned round in about half a minute, noticed that the child was gone, ran one way and another and finally found her struck by a street car about one hundred feet from where she had left her. In an action for the child's injuries, it was *held,* on evidence tending to prove the foregoing facts, that findings were warranted that the mother was justified in leaving the child in the charge of her older sister, and that the sister in the performance of her duty as custodian did all that could be expected of an ordinarily prudent girl of her age.

At the trial of the action above described, there was further evidence that the motorman had an unobstructed view of the street at the place of the accident for a distance of six hundred feet; that, for two and a half hours before the accident, he had had difficulty stopping the car, which was equipped with both air and hand brakes, because of a slippery condition of the rails; that he was running the car, as he approached the place of the accident, at the rate of twenty-five miles an hour and was not sounding the gong; that he first saw the plaintiff when he was one hundred feet from her and she was ten feet from the track, although, previous to that, she had been in plain view while she went a distance of sixty feet. *Held,* that a finding was warranted that the motorman was negligent.

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TWO ACTIONS OF TORT, the first action being for personal injuries received by a daughter, two and one half years of age, of the plaintiff in the second case, when she was struck by an electric street car operated by the defendant on Sea Street in Quincy, and the second action being by the father for consequential damages. Writs dated August 10, 1916.

In the Superior Court the actions were tried together before *Jenney*, J. The material evidence is described in the opinion.

At the close of the evidence the defendant moved that a verdict be ordered in its favor. The motion was denied. The defendant then asked for rulings in substance that, upon all the evidence the plaintiff was not entitled to recover, and that there was no evidence that the motorman of the car was negligent. The rulings were refused. The jury found for the plaintiff in the first action in the sum of $6,250, and for the plaintiff in the second action in the sum of $8,800. The defendant alleged exceptions.

E. P. Saltonstall & C. W. Blood, for the defendant.

F. S. Deitrick, for the plaintiffs.

DE COURCY, J. Mary Sughrue, a little girl about two and a half years old, (hereinafter referred to as the plaintiff,) while crossing Sea Street, in Quincy, was struck by an electric car of the defendant. She sues, by her next friend, for personal injuries; and her father's action is for expenses and loss of services. The questions presented by the exceptions are whether there was evidence of the plaintiff's due care and of the motorman's negligence to warrant the submission of these issues to the jury.

Sea Street is sixty feet wide. On the southerly side was the Sughrue house, the piazza of which was some sixteen feet from the street line, and twenty-five feet from the nearer rail of the defendant's single track. Across the street were two cottages, known as "The Breakers" and the "Ona Ella," situated fifty-five and fifty-eight feet from the northerly rail, and with a clear space between them of twenty-nine feet. The rear of these cottages was about thirty feet from high water mark on the beach.

On the evidence most favorable to the plaintiff the jury would be warranted in finding the following facts: At about ten minutes before eight, on the morning of July 26, 1916, Mrs. Sughrue told her oldest daughter Eleanor, aged thirteen and a half years, to take the plaintiff across to the beach, — where her two other children

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already had gone. This mother had no servant, and was about to prepare breakfast for the family. Eleanor, (who was a pupil in the Cambridge High School at the time of the trial,) for about six years had been accustomed to help her mother in the care of the younger children, taking them out every day when it was fair. On this morning Mrs. Sughrue gave Eleanor instructions to be careful of the plaintiff, and not to leave her out of her sight, and also to look after the other children. She went out on the piazza to see them off, and from time to time thereafter, to watch the children for a second or two.

Eleanor was dressed in her street clothes; and the plaintiff had on a bathing suit, but no hat or shoes. Together they crossed to the beach, and walked up and down between the houses. Then they sat down together watching the bathers at a spot in the rear of "The Breakers" about one hundred feet from where the accident occurred later. In about ten minutes Eleanor saw her little sister Catherine going out in the water near the eel grass. She got up, told the plaintiff to stay there until she came back (to which the plaintiff said "all right"), and went down to Catherine. On turning around about half a minute afterwards Eleanor noticed that the plaintiff was gone. Upon inquiry she learned that Catherine did not know where the little one was, and she ran around the corner of "The Breakers" toward Quincy, did not see her, then ran to the other corner, and saw the car stopped; and when she reached the car the injured plaintiff was in her father's arms.

Assuming that the due care statute (St. 1914, c. 553) is not applicable in this case, the plaintiff admittedly being too young to be capable of caring for herself, her rights must be determined by the care exercised by her proper custodian. From the facts above stated, clearly the jury could find that Mrs. Sughrue was not negligent in entrusting the plaintiff to the oversight of Eleanor, in view of the latter's age and experience. Indeed it is not suggested that the mother could have acted otherwise. And if they believed the evidence supporting the facts above stated, they also could find that Eleanor, in the performance of her duty as custodian, did all that reasonably could be expected from an ordinarily prudent girl of her age. *Sullivan* v. *Boston Elevated Railway*, 192 Mass. 37. *Grella* v. *Lewis Wharf Co.* 211 Mass. 54. *Marchant* v. *Boston & Maine Railroad*, 228 Mass. 472.

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On the issue of the defendant's negligence there was evidence that the motorman on the approaching car had an unobstructed view of the street near the place of the accident for a distance of apparently six hundred feet, or more; that although the car was well equipped with air and hand brakes, he had experienced difficulty in bringing it to a stop during a period of two and a half hours before the accident, owing to the slippery condition of the rails, — and yet was running the car by the cottages on Sea Street at a speed of twenty-five miles an hour, and without sounding his gong; that the car was within one hundred feet of the plaintiff when he first saw her, although she had been in plain view while going from "The Breakers" to the point of the accident, a distance of about sixty feet; and that when the car was a hundred feet from that point, the child was within ten feet of the track. Without reciting in greater detail the testimony favorable to the plaintiff it seems clear that the jury were warranted in finding that the motorman was negligent either in not seeing the child in time to stop the car before it reached her, or in failing to bring it to a stop after he did see her, in time to avoid the accident. *Quinn* v. *Boston Elevated Railway*, 214 Mass. 306. *Harrington* v. *Boston Elevated Railway*, 214 Mass. 563. *Murphy* v. *Worcester Consolidated Street Railway*, 225 Mass. 264.

In each of the cases the entry must be

Exceptions overruled.

EVERETT W. HARRINGTON, administrator, *vs.* LILLIAN M. COUSINS.

Suffolk. March 20, 21, 1918. — May 25, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Practice, Civil, Ordering of verdict. *Evidence,* Presumptions and burden of proof, Relevancy.

At the trial of an action by an administrator of the estate of his mother against his sister for money alleged to have been "received and borrowed" by the defendant from her mother, four items being in issue, there was evidence as to one item that the intestate borrowed such sum from a third person by giving a mortgage upon certain real estate of her own, that the defendant added an amount thereto, that the sums so raised were used to build a house upon the

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premises, and that the house and land subsequently were conveyed to the defendant; that, as to the second and third items, money was drawn by the intestate from banks in Boston and sent to the intestate's attorney in Minneapolis, Minnesota, where she then was residing; that, as to the fourth item, the intestate lent to the defendant a sum of money, receiving a note secured by a mortgage and, after being paid interest thereon for ten years, as a gift to the defendant released and discharged the mortgage and note, and that, when such gift was made, the intestate was in Massachusetts, acting with the counsel and under advice of an attorney at law, and the defendant was in Minnesota. *Held*, that a finding for the plaintiff was not warranted and a verdict properly might be ordered for the defendant.

CONTRACT OR TORT, by the administrator of the estate of Sarah L. Harrington, late of Watertown, the mother of the plaintiff and of the defendant, the declaration being in one count for money "received and borrowed" by the defendant. Writ dated July 22, 1915.

In the Superior Court the action was tried before *Quinn*, J. The material evidence is described in the opinion. At the close of the evidence, on a motion by the defendant, the judge ordered a verdict for the defendant. The plaintiff alleged exceptions.

G. E. Kemp, for the plaintiff.

J. L. Harvey, (*W. J. Bannan* with him,) for the defendant.

DE COURCY, J. The plaintiff as administrator of the estate of his mother, Sarah L. Harrington, seeks to recover from his sister, the defendant, certain sums of money which he claims she has "received and borrowed" from his intestate. The father of these parties died in 1879 and left to their mother his personal property and a life interest in his farm at Watertown. In 1886 the defendant was married and moved to Minneapolis, where she has resided since, with the exception of six years from 1897 to 1903 when she lived in Watertown. For twenty-six years after her marriage, her mother dwelt with her. Mrs. Harrington came to Boston in May, 1912; she remained with her sister Mrs. Bemis until March, 1913, and stayed at the farm in Watertown (which has been the plaintiff's home since 1886) until July 13, 1913. She then was removed to the Westborough State Hospital, where she died on February 6, 1914, at the age of eighty-two years.

1. The first item of the bill of particulars is, "to cash, $2,000." The evidence shows that the $2,000 referred to was a mortgage loan raised by Mrs. Harrington on a lot of land in Minneapolis owned by her, and was expended in the erection of a house thereon.

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The money was not lent to nor received by the defendant; on the contrary she and her husband advanced an additional $1,000 to complete the building. If there is any question as to the validity of the subsequent conveyance of this land to the defendant (in 1910) it is not open in this action.

2. The second and third items (cash $1,060.07 and $497.13) relate to money of the intestate which was drawn from banks in Massachusetts in January, 1911, and forwarded to Mr. Deutch, her attorney in Minneapolis. There is not the slightest evidence that Mr. Deutch paid any of it to or for the benefit of the defendant. Even assuming that the $300, which was paid by Mrs. Harrington to the defendant on account of board, came from these funds, it is not contended that she is under any obligation to repay that sum.

3. The plaintiff has argued a claim for $1,500 which was not included in his bill of particulars but was considered at the trial. It appears that when the defendant was building a residence at Minneapolis in 1887 she received a loan of that amount from her mother. But the uncontradicted evidence is that, after receiving interest on this loan for ten years, Mrs. Harrington made a gift of the money to the defendant, and released the mortgage which was given as security.

Evidence bearing upon the weakening of the intestate's mental capacity especially after May, 1912, and of alleged undue influence, seems to have been admitted without objection. The only transaction to which it could be relevant was the gift of said note and mortgage of $1,500. It is enough to say that the evidence would not warrant a finding that this gift was invalid by reason of mental incapacity of Mrs. Harrington, or of any undue influence exercised by her daughter. Apparently when the papers were executed, the defendant was in Minneapolis and her mother was at Winthrop, Massachusetts, acting willingly, with much deliberation, and aided by the advice of her attorney.

It is unnecessary to consider in detail the plaintiff's requests for instructions, as there was no evidence to warrant a verdict in his favor, and the trial judge rightly directed a verdict for the defendant.

Exceptions overruled.

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GEORGE R. GAYTON *vs.* SAM BORSOFSKY.

Middlesex. March 25, 1918. — May 25, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Negligence, Employer's liability.

At the trial of an action for personal injuries received by a boy twelve years of age while in the employ of the defendant, who was not a subscriber under the workmen's compensation act, there was evidence that the plaintiff was acting as a helper on a pedler's wagon driven by the defendant, and, under his direction, was sitting on a box in the middle of the wagon which rested on bags filled with potatoes, his duty being to see that goods did not fall from the wagon and that children did not steal them; that the plaintiff's foot rested on a board where the floor projected from the side of the wagon; that the defendant started the wagon without giving the plaintiff a customary warning, and that the plaintiff's foot was jerked off the board and caught in the moving wheel. *Held*, that a verdict for the plaintiff was warranted.

TORT for personal injuries received when the plaintiff, twelve years of age, was upon a pedler's wagon of the defendant and in his employ, and caused by alleged negligence of the defendant in starting the wagon. Writ dated November 9, 1916.

In the Superior Court the action was tried before *Lawton*, J. The material evidence is described in the opinion. At the close of the evidence the defendant moved that a verdict be ordered for him. The motion was denied and there was a verdict for the plaintiff in the sum of $150. The defendant alleged exceptions.

S. Sigilman & W. P. Murray, for the defendant, submitted a brief.

E. H. Savary, for the plaintiff.

DE COURCY, J. After a verdict for the plaintiff we must assume that the jury believed the testimony most favorable to him; and on the evidence they could find the following facts: The plaintiff, a boy of twelve years, was employed by the defendant as a helper on his pedler's wagon, and was injured on the first day of his employment. Across the rear end of the open wagon was a box containing fish, at the front end were barrels of apples and boxes of vegetables, and in the middle were bags filled with potatoes. At the time of the accident the plaintiff, as directed by the defendant,

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was sitting on the end of a box in the middle of the wagon, in order to see that the goods did not fall off, and that children did not steal them. This box rested on a partly filled potato bag, and the plaintiff's right foot rested on the "deckboard," where the floor projected from the side of the wagon. The defendant unexpectedly started up the horse, without giving the plaintiff the customary warning; and the boy's foot was jerked out and caught in the revolving wheel.

No question of pleading arises. As the defendant was not insured under the workmen's compensation act, he cannot avail himself of contributory negligence or assumption of risk on the part of the plaintiff. St. 1911, c. 751, Part I, § 1. *Bernabeo* v. *Kaulback*, 226 Mass. 128.

The only issue on liability was that of the defendant's negligence; and on that the plaintiff was rightly permitted to go to the jury. *Moloney* v. *Pemberton Co.* 219 Mass. 460. See *Kean* v. *New York Central & Hudson River Railroad*, 210 Mass. 449; *Keating* v. *Hewatt*, 212 Mass. 577.

Exceptions overruled.

MARGARET DUGGAN *vs.* BAY STATE STREET RAILWAY COMPANY.

Middlesex. March 26, 1918. — May 25, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Statute, Construction. *Constitutional Law*, Due process of law. *Negligence*, Contributory negligence. *Evidence*, Opinion: experts, Presumptions and burden of proof. *Practice, Civil*, Ordering verdict, Exceptions.

A statute must be interpreted according to the intent of the makers, to be ascertained from its several parts and all its words, construed by the ordinary and approved usage of the language, unless the words used have acquired a peculiar meaning in the law, considered in connection with the cause of its enactment, the subject matter to which it applies, the pre-existing state of the common and statutory law, the mischief or imperfection to be remedied, and the main object to be accomplished, to the end that it be given an effect in harmony with common sense and sound reason.

The provision of St. 1914, c. 553, § 1, that "In all actions, civil or criminal, to recover damages for injuries to the person or property or for causing the death of a person, the person injured or killed shall be presumed to have been in the exercise of due care," was intended to change the rule of law previously in force,

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requiring, in actions for injury to person or property through negligence, that the plaintiff should prove his due care as an affirmative proposition either by direct evidence or as a fair deduction from facts established by evidence, and, in actions for the negligent causing of death, that the decedent should be shown to have been actively and actually in the exercise of due care for his own safety; and to establish the presumption that, normally, people exercise due care and are not guilty of contributory negligence, and that the plaintiff in a specific action was so acting; but the statute was not intended to deprive the defendant of a full opportunity to prove by a preponderance of evidence that the plaintiff was not acting in accordance with such presumption.

The further provision of the same section of the statute, that contributory negligence on the part of a person, who has been so injured or killed or whose property has been damaged, "shall be an affirmative defence to be set up in the answer of, and proved by the defendant," merely shifts from the plaintiff the burden of alleging and proving by the preponderance of the evidence his due care or the due care of his decedent as part of his affirmative case and requires the defendant, if he would rely on the defence that the plaintiff or decedent was wanting in due care and that such want contributed to cause the injury or death, to allege it as an affirmative defence and to prove it by a preponderance of the evidence.

St. 1914, c. 553, § 1, does not change the substantive law of negligence. The tribunal hearing an action of tort for personal injuries or death alleged to have been caused by negligence still must be satisfied on all the evidence that the plaintiff or the decedent was in the exercise of due care and did not by his own acts of omission or commission help to produce his injury or death, and that the defendant was negligent.

The provisions of St. 1914, c. 553, § 1, do not require necessarily that in every action therein described, when tried before a jury, the due care of the person who was injured or damaged or whose death was caused becomes a question of fact which must be submitted to the jury; but, where from facts, which are undisputed or indisputable or are shown by evidence by which the plaintiff is bound, only one rational inference can be drawn and that is an inference of contributory negligence or want of due care, then the question of due care or contributory negligence is one of law for the court and a verdict for the defendant should be ordered.

The provision of § 2 of the above statute, repealing all acts and parts of acts inconsistent with § 1, is ancillary to the chief object of the statute and is not in itself in any way unconstitutional.

St. 1914, c. 553, as above construed, does not contravene any provision of the Constitution of the Commonwealth or of the Fourteenth Amendment to the Federal Constitution.

The inference of due care on the part of the plaintiff or decedent in the actions described in the above statute, which by the statute is made a presumption of fact, is not arbitrary nor irrational.

At the trial of an action against a street railway company for personal injuries alleged to have resulted from the plaintiff being thrown from a street car of the defendant by reason of his hold being broken as the car moved rapidly over a poor track, it was error to permit a consulting engineer for electric railway companies, testifying as an expert for the plaintiff, to answer a hypothetical question which contained as hypotheses a statement of all the facts relating to the

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accident which the plaintiff contended the evidence showed, and concluded, "What would you say was the cause of the accident?" the determination of such a question being for the jury on the evidence and not requiring the aid of expert testimony.

An exception to the admission of the testimony above described was overruled as not having injuriously affected the substantial rights of the defendant, since it appeared that the testimony was merely cumulative upon other evidence to the effect that the track was uneven and that the car would lurch going over it so as to throw down a person standing between the seats, the defendant's contentions, supported by a considerable body of evidence, being that the plaintiff attempted to get off the car while it was in motion.

TORT for personal injuries alleged to have been received when the plaintiff, a passenger upon an electric street car operated by the defendant, was thrown therefrom by reason of negligence with which the defendant was chargeable. Writ dated September 15, 1916.

In the Superior Court the action was tried before *Keating*, J. The only questions of law raised by the defendant in this court related to the constitutionality of St. 1914, c. 553, and the admission of testimony, described in the opinion, of one Howard C. Forbes, a witness called by the plaintiff and qualified as an expert consulting engineer for electric railway companies. The hypotheses included in the question put to this witness included a statement of the facts relating to the circumstances of the accident to the plaintiff which the plaintiff contended that her evidence established.

At the close of the evidence, the defendant asked for the following rulings:

"3. The provision of St. 1914, c. 553, § 1, that 'in all actions, civil or criminal, to recover damages for injuries to the person or property . . . the person injured . . . shall be presumed to have been in the exercise of due care' is unconstitutional.

"4. If St. 1914, c. 553, was intended by the Legislature to create a presumption of fact, either to supply a total deficiency of evidence on the subject of the plaintiff's due care, or to be weighed with other evidence of the plaintiff's due care, such statute is unconstitutional and void.

"5. St. 1914, c. 553, makes the contributory negligence of the plaintiff an affirmative defence to be proved by the defendant. It creates no presumption of the fact that the plaintiff was in the exercise of due care.

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"6. If St. 1914, c. 553, be interpreted as creating a presumption of the fact of the due care of an injured person, then said statute is unconstitutional and void as it is in violation of the Constitution of this Commonwealth.

"7. If St. 1914, c. 553, be interpreted as creating a presumption of the fact of the due care of an injured person, then said statute is unconstitutional and void as it is in violation of the Constitution of the United States."

The judge refused so to rule, and instructed the jury as follows:

"The burden is on the defendant to prove by a fair preponderance of the evidence that the plaintiff was not in the exercise of due care. Under our law as it is today an injured party is presumed to be in the exercise of due care, at the time he sustains the injury, and, if the defendant relies upon the defence that the injured party was not in the exercise of due care that there was negligence on his part that contributed to the injury, it is necessary for the defendant to prove that. So in this case, as the defendant alleges that the plaintiff was not in the exercise of due care and that her failure to use due care contributed to the injury, the burden is on the defendant to prove it by a fair preponderance of the evidence. You have heard the testimony introduced by both parties tending to show what the plaintiff was doing at the moment the accident occurred and just before it occurred, you have the evidence introduced by both parties tending to show how the accident happened, and I have already said to you that, if you find the plaintiff jumped off a moving car and was injured, she cannot recover. If you find that she did not jump off a moving car, and if you find that in what she did she acted as an ordinarily prudent woman would be likely to act under such circumstances, then you will find she used due care. If she used due care and was a passenger and was injured through the negligence of the defendant, then she can recover in this action. If she failed to use due care and her failure contributed to the injury, then she cannot recover. If you find for the plaintiff you will consider what damages she is entitled to receive."

There was a verdict for the plaintiff in the sum of $7,000; and the defendant alleged exceptions.

E. P. Saltonstall, (*C. W. Blood* with him,) for the defendant.

J. H. Vahey, (*P. Mansfield* with him,) for the plaintiff.

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RUGG, C. J. The chief question presented in this case is whether St. 1914, c. 553, is contrary to the provisions of the Constitution of this Commonwealth or of the Fourteenth Amendment to the Constitution of the United States. That question was raised by requests for instructions which were denied, and by exception to an instruction given by the presiding judge, in these words: "The burden is on the defendant to prove by a fair preponderance of the evidence that the plaintiff was not in the exercise of due care. Under our law as it is to-day an injured party is presumed to be in the exercise of due care, at the time he sustains the injury, and if the defendant relies upon the defense that the injured party was not in the exercise of due care, that there was negligence on his part that contributed to the injury, it is necessary for the defendant to prove that."

The pertinent parts of the statute are as follows: "Section 1. In all actions, civil or criminal, to recover damages for injuries to the person or property or for causing the death of a person, the person injured or killed shall be presumed to have been in the exercise of due care, and contributory negligence on his or her part shall be an affirmative defence to be set up in the answer of, and proved by the defendant. Section 2. All acts and parts of acts inconsistent herewith are hereby repealed."

It is a principle of general scope that a statute must be interpreted according to the intent of the makers, to be ascertained from its several parts and all its words construed by the ordinary and approved usage of the language, unless they have acquired a peculiar meaning in the law, considered in connection with the cause of its enactment, the subject matter to which it applies, the pre-existing state of the common and statutory law, the mischief or imperfection to be remedied, and the main object to be accomplished, to the end that it be given an effect in harmony with common sense and sound reason. *Holbrook* v. *Holbrook*, 1 Pick. 248. *Commonwealth* v. *Loring*, 8 Pick. 370, 373. *Kilby Bank, petitioner*, 23 Pick. 93. *Commonwealth* v. *Kimball*, 24 Pick. 366, 370. *Moore* v. *Stoddard*, 206 Mass. 395, 399. R. L. c. 8, § 4, cl. 3. *Heydon's Case*, 2 Co. Rep. Part III, 7b, 8, 9. *Eastman Photographic Materials Co. Ltd.* v. *Comptroller General*, [1898] A. C. 571, 576. *O'Grady* v. *Wilmot*, [1916] 2 A. C. 231, 259.

There are three dominant branches of the present statute. The

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first of these creates the presumption of due care on the part of the person injured or killed in all kinds of actions to recover damages for injury to person or property and for causing the death of a person. This is the plain effect of the words used. The previous state of the law upon that point was that ordinarily in actions for personal injury the plaintiff was bound to prove that he was in the exercise of due care at the time of receiving the injury. That was an affirmative proposition. It must be proved either by direct evidence or as a fair deduction from established facts. The burden of proof on that point rested upon the plaintiff. While, if the circumstances under which the injury was received were shown and the evidence excluded fault on the part of the person injured, and there was nothing in his conduct to which his injury might be attributed, due care might be inferred from the absence of all appearance of fault, nevertheless it was an issue which the plaintiff must establish by some kind of evidence. There was no presumption about it one way or the other. If there was a failure of evidence, the plaintiff could not get on. The cases to this effect are very numerous. See, for example, *Hilton* v. *Boston*, 171 Mass. 478; *Maguire* v. *Fitchburg Railroad*, 146 Mass. 379, 382; and *Lizotte* v. *New York Central & Hudson River Railroad*, 196 Mass. 519, 523. This is the law in several other States. *Whalen* v. *Citizens' Gas Light Co.* 151 N. Y. 70, 73. *West Chicago Street Railroad* v. *Liderman*, 187 Ill. 463, 469. *Shadduck* v. *Grand Rapids & Indiana Railway*, 179 Mich. 433, 440. *Ward* v. *Maine Central Railroad*, 96 Me. 136. *Greenwood* v. *Boston & Maine Railroad*, 77 N. H. 101. *Wright* v. *Boston & Maine Railroad*, 74 N. H. 128, 134. *Bovee* v. *Danville*, 53 Vt. 183, 190. *Dreier* v. *McDermott*, 157 Iowa, 726, 729. But it does not prevail universally. In the larger number of States, in England and in the Federal courts, a presumption in favor of the exercise of due care is and has been held to exist in the absence of any evidence having a tendency to show negligence. *Texas & Pacific Railway* v. *Gentry*, 163 U. S. 353, 366. *Baltimore & Potomac Railroad* v. *Landrigan*, 191 U. S. 461, 473. *Wakelin* v. *London & South Western Railway*, 12 App. Cas. 41, 47. *Hanna* v. *Philadelphia & Reading Railway*, 213 Penn. St. 157, 160. *New Jersey Express Co.* v. *Nichols*, 4 Vroom, 434, 438, 439. See cases collected in 29 Cyc. 601, 602.

All actions to recover damages for negligently causing the death

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of a human being are statutory in their origin. There could be no recovery at common law for such an act. *Carey* v. *Berkshire Railroad*, 1 Cush. 475. *Admiralty Commissioners* v. *Amerika Steamship*, [1917] A. C. 38. All of our statutes upon that subject are penal in their nature, differing in this regard from those prevailing in most other jurisdictions. Under some of our statutes recovery also may be had by indictment. Damages are assessed, not according to the injury done but with reference to the degree of culpability of those negligently causing the death of another. *Brooks* v. *Fitchburg & Leominster Street Railway*, 200 Mass. 8. *Boott Mills* v. *Boston & Maine Railroad*, 218 Mass. 582. Under most of these statutes, it was necessary for the plaintiff to prove that the deceased was "actively and actually" in the exercise of due care or due diligence. *Hudson* v. *Lynn & Boston Railroad*, 185 Mass. 510, 521. *Bothwell* v. *Boston Elevated Railway*, 215 Mass. 467, 470. In this class of cases also, except in instances presently to be noted, the plaintiff was not aided by any presumptions in favor of the deceased. He was obliged to make out his case by evidence, or he failed. *Dacey* v. *New York, New Haven, & Hartford Railroad*, 168 Mass. 479, 481. *Moynihan* v. *Boston & Maine Railroad*, 227 Mass. 180, 182.

The inference is almost irresistible that this first branch of the statute was enacted in order to change what had been the common law, and to adopt in place of it the more widely prevailing rule. Its further effect is to put actions for personal injuries and for causing death in the usual case upon the same footing in respect of the presumption as to due care. The kind of due care which the plaintiff commonly was bound to prove was conduct which was free from any legally reprehensible element proximately causative of his injury. That kind of conduct must still be found or there can be no recovery even with aid of the statute. The statute relieves the plaintiff of some difficulties which formerly often barred his way to recovery when for any reason all the facts bearing upon that point were not in evidence. It establishes as the rule for the trial of such cases in the courts the presumption that normally people exercise due care and are not guilty of contributory negligence. The defendant is not deprived of a full opportunity to submit all the facts bearing on that issue.

The second branch of the statute is the correlative of the first.

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It makes the contributory negligence of the person injured a matter of affirmative defence to be pleaded as such, and the burden of proving it falls upon the defendant as the party obliged to plead it. Contributory negligence on the part of a person injured through the negligence of another is want of due care in respect to the event causing the injury, and is in itself conduct having a share in bringing on the harm. Failure to exercise due care respecting the cause of his injury resulting from the negligence of another by the person injured is contributory negligence. *Gaffney* v. *Bay State Street Railway*, 221 Mass. 457, 460. The statute makes no change in the law in that respect. When on all the evidence it appears that the person injured has by his own want of ordinary prudence contributed to the injury, he cannot recover. It shifts the burden of proof from the plaintiff, who formerly was obliged to establish by the greater amount of credible evidence that he was free from contributory negligence, to the defendant, who now must fasten contributory negligence upon the plaintiff by the greater amount of credible evidence or he fails upon this aspect of his case. This branch of the statute also puts the law of this Commonwealth in this particular in harmony with that administered in the Federal and numerous other courts. As was said in *Railroad Co.* v. *Gladman*, 15 Wall. 401, at page 406, "While it is true that the absence of reasonable care and caution, on the part of one seeking to recover for an injury . . . will prevent a recovery, it is not correct to say that it is incumbent upon him to prove such care and caution. The want of such care or contributory negligence, as it is termed, is a defence to be proved by the other side." It was stated in *Central Vermont Railway* v. *White*, 238 U. S. 507, 512: "The United States courts have uniformly held that as a matter of general law the burden of proving contributory negligence is on the defendant." To the same effect among many other decisions, see *St. Louis & San Francisco Railway* v. *Weaver*, 35 Kans. 412, 423; *Haltom* v. *Southern Railroad*, 127 N. C. 255, 257; *Winchester* v. *Carroll*, 99 Va. 727, 738; *Dubiver* v. *City Railway*, 44 Ore. 227, 242; *Schweinfurth* v. *Cleveland, Cincinnati, Chicago & St. Louis Railway*, 60 Ohio St. 215, 223.

These two parts of the statute do not undertake to change the substantive law of negligence in any respect. The tribunal hearing the case must still be satisfied on all the evidence

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that the plaintiff was in the exercise of due care and did not by his own acts of omission or commission help to produce his injury, and that the defendant was negligent. All these elements must appear by the greater amount of credible evidence. Inferences in favor of conduct free from blame are now permitted, which were not possible before. But the plaintiff is not allowed to recover for injuries caused in whole or in part by his own negligent conduct. The effect of the rule prescribed by these two branches of the statute is that an injury caused proximately by the negligence of another shall create an inference of due care on the part of the person so injured. As was said in *Mobile, Jackson & Kansas City Railroad* v. *Turnipseed*, 219 U. S. 35, at page 43, "The only legal effect of this inference is to cast upon" the person thus causing an injury "the duty of producing some evidence to the contrary. When that is done the inference is at an end, and the question of negligence is one for the jury upon all of the evidence. In default of such evidence, the defendant, in a civil case, must lose, for the *prima facie* case is enough as a matter of law." That statement was made in interpreting the effect of a statute creating *prima facie* evidence of negligence on the part of the defendant in certain kinds of cases. It is equally applicable to the statute here under consideration. This statute does not create any new evidence or give any different effect to that which was before competent evidence.

The presumption of due care created by the statute is not itself evidence. It is a simple rule to which resort is had when there is a failure of evidence. A presumption ordinarily is not evidence, but is a rule about evidence. *Commonwealth* v. *Sinclair*, 195 Mass. 100, 110. *Holt* v. *United States*, 218 U. S. 245, 253. *Vincent* v. *Mutual Reserve Fund Life Association*, 77 Conn. 281, 288. *Wabash Railroad* v. *DeTar*, 73 C. C. A. 166; 141 Fed. Rep. 932. Wigmore on Ev. § 2511. See *Clifford* v. *Taylor*, 204 Mass. 358. "Presumptions are not indulged to supply the place of facts; they are never allowed against ascertained and established facts. When these appear, presumptions disappear." *Lincoln* v. *French*, 105 U. S. 614, 617. The presumption of the present statute is merely like numerous other presumptions. It stands only until the facts are shown. But it works an important change in our law. See, in this connection, *Chandler* v. *Prince*, 217 Mass. 451, 454, and

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Turner v. *Williams*, 202 Mass. 500, 505, for illustrations of conflicting presumptions.

The rule placing the burden of proof upon the defendant also is a significant modification of this branch of the law. It is only in comparatively rare instances that it can be ruled as matter of law that a burden of proof depending upon oral testimony has been sustained. *Kelsall* v. *New York, New Haven, & Hartford Railroad*, 196 Mass. 554, 556. *LaFond* v. *Boston & Maine Railroad*, 208 Mass. 451, 456. But instances have arisen in this Commonwealth where only a question of law was presented, and it became necessary to make the ruling that the burden had been sustained. *Debbins* v. *Old Colony Railroad*, 154 Mass. 402. See *McDonough* v. *Metropolitan Life Ins. Co.* 228 Mass. 450, 452, 453, where cases are collected showing both aspects of the rule. Such cases may arise under the present statute. It does not require necessarily that now in every case the due care of the person injured becomes a question of fact. Where from the facts which are undisputed or indisputable, or shown by evidence by which the plaintiff is bound, only one rational inference can be drawn and that an inference of contributory negligence or want of due care, then the question of due care or contributory negligence is one of law for the court and a verdict for the defendant should be directed. This has been held often in those jurisdictions where the common law rule is in accordance with that now established by the present statute. *Schofield* v. *Chicago, Milwaukee & St. Paul Railway*, 114 U. S. 615. *Northern Pacific Railroad* v. *Freeman*, 174 U. S. 379. *Cassidy* v. *Angell*, 12 R. I. 447, 448. *Denver City Tramway Co.* v. *Cobb*, 90 C. C. A. 459, 461; *S. C.* 164 Fed. Rep. 41. *Baltimore & Ohio Railroad* v. *Whitacre*, 35 Ohio St. 627, 630. *Bonnell* v. *Delaware, Lackawanna & Western Railroad*, 10 Vroom, 189, 192.

The third branch of the statute is found in § 2. Its effect is to repeal other provisions of law inconsistent with the terms of this act. This is a provision not uncommon in statutes, is ancillary to their chief objects, and of itself cannot be thought to be in any respect unconstitutional. Its nature on that point depends upon the main terms of the act. If it be assumed that one result of this section is to do away with the terms of those death statutes which have heretofore required proof of actual and active exercise of due

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care on the part of the deceased as a prerequisite to recovery, as pointed out in *Hudson* v. *Lynn & Boston Railroad*, 185 Mass. 510, its validity still depends upon the first section of the act.

The statute as thus construed does not contravene any provision of our constitution. It comes within the principle expounded in *Commonwealth* v. *Williams*, 6 Gray, 1, at pages 5 and 6, in these words: "It is no new thing in the history or administration of the law, that peculiar and artificial force is given or attributed to particular facts, or series of facts, as means and instruments of legal proof. This may be seen in many of the rules of evidence which prevail by the common law, and in others which derive their force from legislative acts. These then are conclusive presumptions, which, from motives of public policy, or for the sake of greater certainty, or for the promotion of the peace and quiet of the community, have been adopted by common consent. Sometimes the common consent, by which this class of presumptions is established, is declared through the medium of the judicial tribunals, and thus becomes a part of the common law of the land. And sometimes it is expressly declared by the direct authority of the Legislature in statutes duly enacted." The present statute simply affects procedure and the burden of proof. It does not work any modification of fundamental rights. The law of negligence in all its essentials remains as before. It was said in *Holmes* v. *Hunt*, 122 Mass. 505, at page 516, "The constitutional power of the Legislature to prescribe rules of evidence is well settled. . . . This power has been often exercised by the Legislature, with the sanction of the courts, so as to change the burden of proof, or to affect the question what shall be deemed *prima facie* evidence at the trial before the jury." Many illustrations there are collected. See, also in this same connection, *Commonwealth* v. *Anselvich*, 186 Mass. 376; *Crandell* v. *White*, 164 Mass. 54; *Opinion of the Justices*, 208 Mass. 619, 624; *Conners* v. *Lowell*, 209 Mass. 111, 116. As was said by Mr. Justice Holmes, in *McFarland* v. *American Sugar Refining Co.* 241 U. S. 79, 86, "As to the presumptions, of course the Legislature may go a good way in raising one or in changing the burden of proof, but there are limits. It is 'essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be

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a purely arbitrary mandate.'" But it cannot be said that the inference of due care under the circumstances posited in the statute is so unreasonable as to be purely arbitrary in the face of the adoption of that rule by so many courts as matter of common practice. The ground for reaching that conclusion, stated in *Baltimore & Potomac Railroad* v. *Landrigan*, 191 U. S. 461, 474, may be taken as illustrative of the views of those courts. "The presumption [of due care on the part of the person injured] is founded on a law of nature. We know of no more universal instinct than that of self preservation — none that so insistently urges to care against injury. It has its motives to exercise in the fear of pain, maiming and death. There are few presumptions, based on human feelings or experience, that have surer foundation than that expressed in the instruction objected to. But notwithstanding the incentives to the contrary, men are sometimes inattentive, careless or reckless of danger. These the law does not excuse nor does it distinguish between the degrees of negligence."

It is provided by St. 1906, c. 463, Part II, § 245, that a person injured in his person or property, or the executor or administrator of a person killed, by collision at a highway grade crossing with an engine or cars of a railroad corporation, by reason of its neglect to give the statute signals, shall recover, unless it is shown that, in addition to mere want of ordinary care, the person injured or killed, or the person who had charge of his person or property, contributed to the injury by gross or wilful negligence or by acting in violation of law. This statute has been in force in some form since St. 1871, c. 352. It has been construed as relieving the plaintiff from the burden of proof in respect of due care and as imposing a heavy burden of proof upon the defendant as an affirmative defence. Although many cases have arisen under that statute, its constitutionality has never been assailed or doubted. *Manley* v. *Boston & Maine Railroad*, 159 Mass. 493. *McDonald* v. *New York Central & Hudson River Railroad*, 186 Mass. 474, 476. *Kelsall* v. *New York, New Haven, & Hartford Railroad*, 196 Mass. 554. *Brooks* v. *Fitchburg & Leominster Street Railway*, 200 Mass. 8, 14. Yet that statute goes further than the one now attacked. It establishes liability quite apart from negligence, as well as imposes a heavy burden of proof on the defendant. And it relates to injuries to person and property for which actions lay at common law

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as well as to damages for death proceedings for which are wholly the creature of statute.

Of the same general character in this aspect is the statute making railroad companies liable for damages resulting from fire communicated by its locomotive engines. St. 1906, c. 463, Part II, § 247. See, in this connection, *New England Box Co.* v. *New York Central & Hudson River Railroad,* 210 Mass. 465, where the evolution of that branch of statutory liability from the original principles of negligence to the present is traced. The constitutionality of that act is established in this Commonwealth, *Ingersoll* v. *Stockbridge & Pittsfield Railroad,* 8 Allen, 438, and that of a similar nature has been upheld as not in contravention of the Fourteenth Amendment. *St. Louis & San Francisco Railway* v. *Mathews,* 165 U. S. 1. See, also, *Cincinnati, N. O. & T. P. Railway* v. *South Fork Coal Co.* 71 C. C. A. 316; *S. C.* 139 Fed. Rep. 528.

There are several instances where a plaintiff under the death statutes could recover without proving that the person injured was in the exercise of due care. See R. L. c. 51, § 17; c. 70, § 6; St. 1907, c. 392; *Jones* v. *Boston & Northern Street Railway,* 205 Mass. 108; *Brooks* v. *Fitchburg & Leominster Street Railway,* 200 Mass. 8, 12, 13. See also *Hanley* v. *Eastern Steamship Corp.* 221 Mass. 125, 133. Although the validity of these statutes might be sustained on other grounds, they show that the conception of omitting the requirement of proof of due care as a burden resting upon the plaintiff is not unfamiliar in our practice.

Statutes of import similar to the one here assailed have been upheld in other states. *Sackheim* v. *Pigueron,* 215 N. Y. 62. *Wallace* v. *Western North Carolina Railroad,* 104 N. C. 442. *Morris* v. *Florida Central & Peninsular Railroad,* 43 Fla. 10. *Diamond Block Coal Co.* v. *Cuthbertson,* 166 Ind. 290, 306. See *Murphy* v. *Boston & Maine Railroad,* 77 N. H. 573, 574.

In view of all these considerations, it hardly can be said that the inference of due care on the part of a person injured, as provided by the statute, is purely arbitrary or irrational.

The question, whether the statute contravenes any provision of the Fourteenth Amendment to the Federal Constitution, appears to us to be settled in favor of its validity by numerous adjudications of the United States Supreme Court. In *Mobile, Jackson & Kansas City Railroad* v. *Turnipseed,* 219 U. S. 35, a statute

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of Mississippi, to the effect that certain kinds of injuries on railroads should be presumed to be caused by the negligence of the defendant, was sustained. In principle that decision goes further than is required to uphold the statute here attacked. Moreover, the statute simply establishes a rule of evidence and burden of proof followed by the Federal courts as matter of judicial practice. The same principle is illustrated by *Bailey* v. *Alabama*, 219 U. S. 219, 238, *Reitler* v. *Harris*, 223 U. S. 437, 441, 442, *Luria* v. *United States*, 231 U. S. 9, 24, 25, *Easterling Lumber Co.* v. *Pierce*, 235 U. S. 380, *Bowersock* v. *Smith*, 243 U. S. 29, 34, *Minneapolis & St. Louis Railway* v. *Beckwith*, 129 U. S. 26, *Bunting* v. *Oregon*, 243 U. S. 426, *Mountain Timber Co.* v. *Washington*, 243 U. S. 219, *Hawkins* v. *Bleakly*, 243 U. S. 210, 214. In view of these and other recent decisions by the United States Supreme Court, further discussion on this point seems superfluous.

The question to the expert upon a series of hypotheses concluding with the inquiry, "What would you say was the cause of the accident?" ought not to have been put. *Twomey* v. *Swift*, 163 Mass. 273, 275. That was the issue to be settled by the jury on the facts proved, and did not require the aid of expert testimony as to what might cause a person to lose his hold on a car moving rapidly over a poor track. *Whalen* v. *Rosnosky*, 195 Mass. 545, 547. But the answer was merely cumulative of other evidence, to the effect that the track was uneven and a car would lurch going over it so as to throw a person standing between the seats. The theory of the defence, supported by a considerable body of evidence, was that the plaintiff attempted to get off a moving car. The question and answer did not directly bear on the main controversy at the trial. On the whole it appears that, although the evidence was not strictly within the discretion of the trial judge, its admission has not injuriously affected the substantial rights of the defendant. St. 1913, c. 716, § 1. See *Jeddrey* v. *Boston & Northern Street Railway*, 198 Mass. 232, 235.

Exceptions overruled.

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MARYLAND CASUALTY COMPANY *vs.* JOHN P. JACKSON & another.

Bristol. March 27, 1918. — May 25, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Insurance, Liability. *Practice, Civil*, Charge to jury, Requests and instructions. *Attorney at Law.*

At the trial of issues framed in a suit in equity brought by an insurance company against one, insured by it against liability arising from accidents in which his motor vehicle was involved, and an attorney at law alleged to have been in collusion with the insured to defraud the plaintiff, to enjoin the insured from maintaining an action of contract upon the policy, a material question was, whether the insured, by false testimony and by fraud either alone or in collusion with the attorney at law and a person injured in a collision with the insured's motor vehicle, had defrauded the insurance company. There was evidence tending to show that the defence of various actions by the injured person against the insured had been wholly in the charge of attorneys employed by the insurance company and that the insured had not consulted nor retained counsel of his own therein; that the attorney, who was the person alleged by the company to have been in collusion with the insured to defraud the company, represented the insured in various matters not related to the litigation as to the accident caused by the motor vehicle, and finally took charge of the action of the injured person against the insured, and also was the insured's attorney in the action upon the policy against the company. The judge presiding at the trial charged the jury in substance that the attorney had a legal right to represent the insured in matters unrelated to the action against him by the person who was injured in the collision with the motor vehicle and to represent the injured person in that action; that "we are not dealing with the question of propriety or impropriety here. We are dealing simply with legal questions in this case, and I don't say that it was proper or that it was improper. I simply say that it wasn't illegal." *Held*, that there was no error in the charge.

It also was *held* that the instructions above quoted did not preclude the jury from considering the propriety of the attorney's appearance in the case or any inference of collusion therefrom.

It further was *held* that it was not fairly open to the plaintiff to argue as to such instructions that "the stamp of approval given by the court as a matter of law to the action of" the attorney "prevented the jury from considering this very vital element [of collusion] in passing upon the contentions of the plaintiff."

An exception to the conduct of the judge presiding at a trial of the issues in the suit above described, in reading to the jury at the close of his charge requests previously presented to him by one of the parties, with comments upon them as he read them, instead of covering the subject matter of the requests in the course of his charge, was overruled.

BILL IN EQUITY, filed in the Supreme Judicial Court on November 3, 1916, alleging in substance that the plaintiff had insured the

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defendant John P. Jackson against loss from liability for damages caused by motor vehicles owned by him; that one Manuel Medeiros received personal injuries in a collision with an automobile belonging to Jackson driven by one Cuffe, and, as a result of legal proceedings against Jackson, recovered a judgment of $4,200; that, upon notice from Jackson, he had been defended in such proceedings by attorneys employed by the plaintiff; that the attorney for Medeiros at the final trial of his action was David R. Radovsky, Esquire, who at the time of the trial was the "personal counsel" for Jackson "in all matters;" that Jackson, in collusion with Medeiros and Mr. Radovsky, deceived and defrauded the plaintiff by testifying at different times differently upon the issue, whether Cuffe was using the automobile for his own purposes or for Jackson's at the time of the injury to Medeiros, his testimony at the final trial favoring Medeiros; that Jackson had assigned his rights under the insurance policy to one Louis Altshuller, also a defendant; and that Jackson had brought an action at law upon the policy against the plaintiff. The prayers of the bill were that the fraud of Jackson toward the plaintiff be established and that Jackson and Altshuller be enjoined from prosecuting any action against the plaintiff upon the policy of insurance.

Jury issues, described in the opinion, were framed and were sent to the Superior Court, where they were tried before *Dubuque*, J. The material evidence also is described in the opinion. The answers of the jury were favorable to the defendants. The plaintiff alleged exceptions.

A. T. Smith, for the plaintiff.

D. R. Radovsky, for the defendants.

De Courcy, J. One Manuel Medeiros was knocked down and injured by an automobile on North Main Street in Fall River in April, 1911. Shortly afterwards he brought an action in the local district court against John P. Jackson, the alleged owner of the automobile, to recover for his injuries; and Charles Cuffe, the chauffeur, was arrested for failing to stop after injuring a man. After trial, Cuffe was discharged; and in the civil action there was a finding for the defendant. Medeiros appealed his case to the Superior Court, later discontinued it, and brought a new action in the Superior Court for a larger *ad damnum*. This action re-

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sulted in a verdict of $4,200 in favor of the plaintiff, Medeiros, in February, 1916.

Jackson had a policy of liability insurance, issued by the Maryland Casualty Company, and that company conducted the defence in both courts, by its own counsel. After the trial the casualty company refused to pay the amount of the verdict, and an action was brought by Jackson on his policy. The present suit was filed in the Supreme Judicial Court on November 3, 1916, to restrain the prosecution of said action on the policy. Certain jury issues were framed and were tried in the Superior Court, the material ones being as follows:

"1. Did John P. Jackson at the trial of the case of Manuel Medeiros against him in the Superior Court for the County of Bristol give testimony that was knowingly false for the purpose of fixing liability against himself so that the Maryland Casualty Company would be obliged to pay money under the terms of its policy or contract with said Jackson?"

"2. Did John P. Jackson, either himself or in collusion with another or others, deceive the Maryland Casualty Company or its attorneys as to the testimony he proposed to give at the trial of the action of Manuel Medeiros against him in the Superior Court for the County of Bristol, and did he give testimony materially different from that which he represented to said company or its attorneys that he would give at said trial for the purpose of fixing liability against himself so that the Maryland Casualty Company would be obliged to pay money under the terms of its policy or contract with said Jackson?" To each of these questions the jury answered, "No." The case comes before us on the plaintiff's exceptions to certain portions of the judge's charge, and to the giving of certain rulings requested by the defendant.

The portion of the charge specifically excepted to was as follows: "Something has been said about Mr. Radovsky's coming in the case, and being counsel for Dr. Jackson in some four other suits then pending in the Superior Court. It does appear that those suits were for some family matters, estates as I understand it, and that they were not connected with this litigation. Legally Mr. Radovsky had a right to appear in another suit against the doctor, even though the doctor was his client in a particular suit. We are not dealing with the question of propriety or impropriety

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here. We are dealing simply with legal questions in this case, and I don't say that it was proper or that it was improper. I simply say that it wasn't illegal. Mr. Radovsky had a right to appear in that case for Medeiros if Medeiros hired him and wanted him to, and it does appear that he consented to come on condition that Judge Cook was willing that he should come, or should consent, or should ask him to come, and after conference together they agreed that he should come and try the case." In view of the fact that the casualty company took full control of Jackson's defence in the district and superior courts, and employed its own counsel, and that apparently Jackson never consulted or retained counsel of his own in the cases, we find no error in the portion of the charge quoted. Nor does it seem fairly open to the argument that thereby the jury were precluded from considering the propriety of Mr. Radovsky's appearance in the case, or any inference of collusion therefrom; or that "the stamp of approval given by the court as a matter of law to the action of Mr. Radovsky prevented the jury from considering this very vital element in passing upon the contentions of the plaintiff."

The testimony of Jackson at the trial referred to in the issues to the jury did not relate to the due care of Medeiros, the negligence of the chauffeur, or the extent of the injuries. The alleged false statement was his testimony that he expected Cuffe to meet him with the automobile at the railroad station, at about the time of the accident, and that it was customary for Cuffe to meet him on his return from Boston. This had a vital bearing on the issue whether Cuffe was using the automobile on business of his employer at the time. Jackson's testimony in the Superior Court on this issue seems to have been in flat contradiction of what he testified to in the district court. Nevertheless the jury were justified in finding on the testimony of other witnesses, that he told the truth in the Superior Court, and in answering the issues accordingly.

While the trial judge well might have covered the subject matter of the defendant's requests in the course of his charge, instead of emphasizing their argumentative effect by reading them at the close; (especially those relating to the second issue) we cannot say that the judge erred in giving them as he did, with comments.

Exceptions overruled.

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NICOLO FRATTO *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Middlesex. March 27, 1918. — May 25, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Practice, Civil, Judge's charge, Exceptions. *Negligence,* Contributory, Employer's liability.

In an action against a street railway corporation for personal injuries sustained, before the passage of the workmen's compensation act and St. 1914, c. 553, when the plaintiff was working for the defendant in a sand pit, into which a track of the defendant at a grade of fifteen per cent was laid for the purpose of towing out flat cars loaded with sand, by reason of being struck by such a loaded sand car that was being towed by an electric car which, having failed to reach the top of the grade pulling the heavy load, was slowly backing down, it appeared that the plaintiff and two fellow workmen were leaving the pit and were taking their tools to a box near the crest of the hill, going on the track which was the only available way, that, as the car approached, one of the plaintiff's fellow workmen stepped off the track to the right and the other to the left but that the plaintiff remained on the track and was struck by the sand car. A witness for the plaintiff testified that the plaintiff "was looking at the ties, for there were some of them uncovered." The presiding judge in his charge to the jury said, "It is said on the part of the defendant that his [the plaintiff's] head was down. There was some evidence introduced tending to show that his head was down; that he was looking at the sleepers." When at the close of the charge the judge's attention was called to this statement, he said to the jury, "If you understood the evidence was different, you will rely upon your own recollection of the evidence. I have told you time and again not to rely upon my understanding, but upon your own recollection." Later he said, without objection from the plaintiff, "In the first place, what is the fact? Did he go with his head down, or did he go looking up? If he went looking up, must he necessarily have seen the car or known that the car was coming? If he was looking down, and not looking for a car, was he justified in not looking for a car on account of there being no danger that he had any reason to anticipate?" The jury found that the plaintiff was not in the exercise of due care, and the plaintiff alleged exceptions to the first statement of the judge quoted above. *Held,* that the statement of the judge seemed to be warranted by the evidence; and that, in any event, the judge was careful not to impose his recollection of the evidence upon the jury and that the exceptions must be overruled.

In the same case the plaintiff excepted to a statement in the judge's charge, "Now suppose you find he was not in the exercise of due care, that is the end of the case; he cannot recover." *Held,* that the exception must be overruled; because, if the plaintiff could have avoided the accident by stepping from the track as his companions did, his failure to do so was the direct cause of his injury; and, assuming that the motorman could have avoided the accident by stopping the car after he saw the plaintiff, his failure to do so, if negligent, would have been the negligence of a fellow servant.

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TORT for personal injuries sustained on November 25, 1910, when the plaintiff was working for the defendant in a gravel and sand pit in Watertown. Writ dated December 27, 1910.

In the Superior Court the case was tried before *Raymond*, J. The evidence is described in the opinion, where also are stated the three special questions submitted by the judge to the jury with the answers thereto and the exceptions taken by the plaintiff to certain statements made by the judge in his charge to the jury. The jury returned a general verdict for the defendant, and the judge reported the case for determination by this court.

J. H. Vahey, (*P. Mansfield* with him,) for the plaintiff.

H. D. McLellan, for the defendant.

DE COURCY, J. The plaintiff was working for the defendant in a gravel and sand pit at Watertown. A railway track, four or five hundred feet in length, extended from Arlington Street down to the level of the pit. At about five o'clock in the afternoon of November 25, 1910, a sand car had been loaded at a point about one hundred feet up from the level, where the grade of the track was approximately fifteen per cent. An electric car, to which this flat car was coupled as a trailer, was unable to pull the heavy load up to the crest, and the cars backed down slowly, either because they slipped back, as contended by the plaintiff, or because the motorman on the motor car desired to get a start from the level piece of track below. The plaintiff and two fellow workmen had finished work at the pit, and were taking their tools to the box near the crest of the hill. They proceeded part of the way upon the track, and as the car approached one of them stepped off the track to the right, and another to the left; but the plaintiff, remaining on the track, was struck by the flat car and seriously injured.

The case went to the jury on common law counts alleging (1) that the plaintiff was negligently put to work in an unsafe place, (2) negligence in furnishing an unsafe, defective and dangerous electric car, and (3) failure to give the plaintiff instructions and notice of dangers incident to his employment. The jury returned a general verdict for the defendant, and also answered three questions submitted to them as follows:

1. "Was the plaintiff in the exercise of due care?" Answer, "No." 2. "Was the defendant guilty of negligence in the use

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and equipment of the electric car that ran over the plaintiff in relation to the trolley pole?" Answer, "Yes." 3. "If the defendant was negligent in the use and equipment of the electric car, in relation to the trolley pole, did that negligence contribute to the accident?" Answer, "No."

In the course of his charge to the jury the judge said: "It is said on the part of the defendant that his [the plaintiff's] head was down. There has some evidence been introduced tending to show that his head was down, that he was looking toward the sleepers." The first exception argued on behalf of the plaintiff is to this language, as an alleged prejudicial misstatement and misinterpretation of the evidence. As matter of fact the plaintiff's witness Popolo testified as follows: "Q. Was Fratto running with his head down and did he run against the car? A. Fratto was looking at the ties, for there were some of them uncovered." In the cross-examination of the plaintiff himself appears, "Q. Were you running up hill at the time of the accident? A. I was running to put the shovel into the box." There was other testimony that the three men "were running toward the car." When, at the close of the charge, the judge's attention was called to the language in question he said to the jury, "If you understood the evidence was different, you will rely upon your own recollection of the evidence. I have told you time and again not to rely upon my understanding, but upon your own recollection." Later in the charge he dwelt on this subject as follows, without objection: "In the first place, what is the fact? Did he go with his head down, or did he go looking up? If he went looking up, must he necessarily have seen the car or known that the car was coming? If he was looking down, and not looking for a car, was he justified in not looking for a car on account of there being no danger that he had any reason to anticipate?" It seems to us that the judge's statement was fairly warranted by the evidence, and that in any event he was careful not to impose his recollection upon the jury. This exception must be overruled.

The plaintiff also excepted to the statement in the charge, "Now suppose you find he was not in the exercise of due care, that is the end of his case; he cannot recover." It is to be remembered that the statute relieving a plaintiff from the burden of proving his due care (St. 1914, c. 553) was not in existence at the

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time of the accident. In support of this exception the plaintiff argues elaborately the doctrine of the "last clear chance." No such issue, however, was raised at the trial or suggested in the plaintiff's requests for rulings. Further, we are aware of no case wherein that doctrine has been adopted in this Commonwealth. It was said in *Black* v. *New York, New Haven, & Hartford Railroad,* 193 Mass. 448, 451, " . . . the doctrine has been established that, when the plaintiff's negligence or wrongdoing has placed his person or property in a dangerous situation which is beyond his immediate control, and the defendant, having full knowledge of the dangerous situation, and full opportunity, by the exercise of reasonable care, to avoid any injury, nevertheless causes an injury, he is liable for the injury. This is because the plaintiff's former negligence is only remotely connected with the accident, while the defendant's conduct is the sole, direct and proximate cause of it." In the present case the plaintiff was able to avoid the accident by stepping from the track, as his companions did. And, assuming that the motorman could have avoided the accident by stopping the car after he saw the plaintiff, his failure to do so, if negligent, would be the negligence of a fellow servant, for which the defendant is not answerable in this common law action.

The only other exception argued by the plaintiff is that to the ruling that there was no sufficient evidence to submit to the jury the question, whether the defendant was negligent with reference to the car's braking power or mechanism, as well as in relation to the trolley pole. In view of the finding by the jury that the plaintiff was not in the exercise of due care, the consideration of this exception becomes immaterial.

The seriousness of the injuries suffered makes this a hard case, especially as the workmen's compensation act was not in effect at the time of the accident. But after a full and fair trial, in which he was represented by competent counsel, the jury have found that the accident was due in part to the plaintiff's failure to exercise reasonable care for his own safety. And, as no error in the conduct of the trial has been shown, the entry must be

Judgment on the verdict for the defendant.

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VICTOR PIGEON *vs.* MASSACHUSETTS NORTHEASTERN STREET RAILWAY COMPANY.

LETITIA V. WARD *vs.* SAME.

KATHLYN C. WARD *vs.* SAME.

MARY E. O'CLAIR *vs.* SAME.

Middlesex. January 9, 1918. — May 27, 1918.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Negligence, Contributory. *Motor Vehicle.*

In an action of tort for personal injuries, where the defence of contributory negligence is set up in the answer and the evidence shows that the plaintiff necessarily must have been negligent, St. 1914, c. 553, does not require the submission of the case to the jury.

In four actions of tort against a street railway corporation for personal injuries sustained by being run into by an electric street railway car of the defendant when the plaintiffs were travelling in a motor butcher cart driven by one of them, who was its owner, the other three being his guests and all four sitting on one seat, it appeared that the plaintiffs were moving slowly, having started just before the accident from the dooryard of a farm house where the motor cart had been standing facing the defendant's track. When it started they were about twelve feet from the nearer rail of the defendant's track and each of them testified that he or she realized the danger and each one was on the lookout for a street railway car. Each of the guests testified that she was not relying on the owner, who was driving the motor cart, but was exercising care for herself. Each of the plaintiffs testified that he or she looked in the direction from which the defendant's street railway car came and saw nothing. But the circumstances of the collision showed that the approaching car of the defendant was in the plain field of vision of each of the plaintiffs for a sufficient period of time to have enabled the owner of the motor cart to have stopped it in time to avoid the collision if any one of the plaintiffs had seen and spoken of the danger. *Held*, that it was an irresistible inference of fact, that, if any of the plaintiffs had seen the defendant's car and had acted with reasonable prudence in giving the alarm, the accident could have been avoided, and that the only reasonable conclusion was that the negligent conduct of each of the plaintiffs helped to bring on the accident, so that a verdict rightly was ordered for the defendant in each of the cases.

In the cases above described it appeared that at the time of the accident the license to operate a motor vehicle which had been granted to the plaintiff who owned and was operating the motor cart had expired and had not been renewed, and it was *held* that, although the absence of an operating license was some evidence of negligence on the part of this plaintiff in operating the car, it was not conclusive and did not warrant the ordering of a verdict for the defendant as against that

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plaintiff, and, in deciding on other evidence that all the plaintiffs were negligent as matter of law, this court did not consider as an element the absence of an operating license.

FOUR ACTIONS OF TORT against a street railway corporation by the owner and operator of a motor butcher cart, and by each of three women, who were travelling with him as his guests in the motor cart, for personal injuries sustained by the respective plaintiffs and damage to the motor cart of the plaintiff in the first case, caused by a collision with an electric street railway car alleged to have been operated negligently by servants of the defendant. Writ in the first case dated November 28, 1916, and writs in the other three cases dated November 29, 1916.

In each of the four cases the answer contained an allegation that the plaintiff was not entitled to maintain the action for the reason that at the time or times mentioned in the declaration the plaintiff was not in the exercise of due care.

In the Superior Court the cases were tried together before *Morton*, J. The evidence for the plaintiffs is described in the opinion. At the close of the plaintiffs' evidence, the judge ordered a verdict for the defendant in each of the four cases, and reported the cases for determination by this court, under a stipulation agreed to by all the parties that, if the case of the plaintiff Pigeon should have been submitted to the jury, judgment was to be entered for him in the sum of $3,000; that, if the case of the plaintiff O'Clair should have been submitted to the jury, judgment was to be entered for her in the sum of $600; that, if the case of the plaintiff Letitia V. Ward should have been submitted to the jury, judgment was to be entered for her in the sum of $300; and that, if the case of the plaintiff Kathlyn C. Ward should have been submitted to the jury, judgment was to be entered for her in the sum of $100; but a judgment was to be entered for the defendant in any case in which there was no error in ordering a verdict.

E. Fisher & A. S. Howard, for the plaintiffs.

J. J. Ryan & J. T. Fitzgerald, for the defendant, submitted a brief.

RUGG, C. J. These are actions of tort to recover compensation for personal injuries suffered by the several plaintiffs in a collision between a motor vehicle in which they were travelling and a trolley

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car of the defendant. The plaintiff Pigeon was the driver of a motor vehicle used as a butcher cart, and the other plaintiffs were with him as his guests. Pigeon drove into the dooryard of a farmhouse in a thinly settled district in the town of Dracut, which was approached by a curving drive, so that when the automobile came to a stop, it was turned in the beaten path, facing toward the highway, the forward end projecting about two feet beyond the the corner of the house and being about twelve feet from the inner rail of the defendant's track. The distance from the front spring of the automobile to the steering wheel was six and a half feet; the entire length of the automobile was fourteen feet. Pigeon testified that as he cranked his automobile preparatory to leaving the yard, he looked past the corner of the house toward Lowell (from which direction the defendant's car came), for a distance of about four hundred and fifty feet, and saw no car. Still looking for any approaching car, as he straightened himself up and seated himself, one of the women being on his left and two on his right, he started the automobile on low speed. He was able to stop the automobile within a distance of three feet. During the time he was travelling the distance of twelve feet from where the automobile stood to the inner rail of the track, he did not see anything coming until just as the collision took place. He listened for the sound of a whistle, but heard none until a moment before he was struck, and he heard no bell. The collision with a trolley car of the defendant occurred just as the motor car, having traversed a distance of about twelve feet after starting, reached the inner rail of the track. Pigeon was familiar with the place and knew that there was danger in driving out of the yard. In answer to the question, why he did not ask one of his guests to go forward to see if a car was coming before driving out, he answered, "The reason is this, ahead of the track I didn't see anything coming, I didn't think there was anything coming and furthermore if I had heard a whistle blow from the distance that they should warn you before they get to that crossing, I would have plenty of time to stop my car."

The female plaintiffs all testified in effect that they were not talking from the time the automobile was cranked until the collision; that they realized that it was a place of danger; that they looked in the direction from which the defendant's street railway car

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came, but did not see it until it was within a few feet, and that they were listening for a whistle and bell, but heard none. By the rules of the defendant it was the duty of the motorman to blow the whistle on his car when passing a post two hundred and fifty feet before reaching the place of collision. The testimony of several witnesses that they were listening for the whistle, and did not hear it, had a tendency to show that no whistle was sounded. *Slattery* v. *New York, New Haven, & Hartford Railroad*, 203 Mass. 453. While doubtless the plaintiffs might rely to some extent upon the absence of a whistle, they could not and did not undertake to depend upon it entirely.

There was no precise testimony as to the speed of the defendant's car. But it appeared that the front axle of the automobile was bent, torn from the springs and carried away from the machine. The spokes of one front wheel were bent and broken, the frame badly bent, and the butcher's cart body demolished. The defendant's car went about one hundred and thirty-five feet beyond the point of collision on an up grade. The fifth, eighth and ninth seat posts from the front of the defendant's car were broken. Although the indication from this fact alone well might be that the automobile struck the side of the car, there also was testimony that the front of the automobile was on the rail and was struck by the car, whereby it was thrown around and against the side of the car. Under these circumstances the place of impact was a question of fact.

Pigeon had been for several years licensed to operate an automobile, but at the time of the accident his license had expired and had not been removed. This was some evidence of his negligence in operating the car, but it was not conclusive and did not warrant the ordering of a verdict. *Bourne* v. *Whitman*, 209 Mass. 155. That factor is laid on one side.

All the circumstances confronting the plaintiffs are set out in this record. Each testified. All the evidence, consisting chiefly of the immutable fact of the collision and of the testimony of the plaintiffs themselves, permits only one rational inference, and that is that the negligence of the plaintiffs directly contributed to their injuries. It was daylight. All the people were on one seat of the automobile. As it started they were about nineteen feet from the rail. Each realized the danger and each one was on the

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lookout for a car, according to the testimony of each. From the facts as stated by each of them, the inference is irresistible that, if any of them had seen the car and acted with prudence in giving the alarm, the accident might have been avoided. The automobile was just starting from a stationary position on low speed and necessarily moving slowly. It could have been brought to a stop almost instantly. The record discloses a situation where the plaintiffs, each on his or her own account, went into the path of a known danger in plain sight without rational explanation consistent with due care. If they had taken the obvious precautions which ordinarily cautious persons ought to have taken for their safety, the accident would not have happened. The case is within the authority of numerous decisions. *Ferguson* v. *Old Colony Street Railway*, 204 Mass. 340. *Collins* v. *Boston Elevated Railway*, 218 Mass. 284. *Lynch* v. *Boston Elevated Railway*, 224 Mass. 93. *McManus* v. *Boston Elevated Railway*, 216 Mass. 191. *Singer Sewing Machine Co.* v. *Springfield Street Railway*, 216 Mass. 138. *Newburg* v. *Fitchburg & Leominster Street Railway*, 219 Mass. 21. *Itzkowitz* v. *Boston Elevated Railway*, 186 Mass. 142. *Tognazzi* v. *Milford & Uxbridge Street Railway*, 201 Mass. 7. Notwithstanding the oral testimony to the effect that each looked for the car in the direction from which it came, the fact of the accident demonstrates that it was within the plain field of vision of each one for a sufficient period of time to have enabled Pigeon to stop his automobile if any of them had seen and spoken of the danger. The fact that no one of them did this is irrefutable evidence of negligence of each directly contributing to the accident. Essential circumstances undisputed or shown by the testimony of each plaintiff are incompatible with any other reasonable conclusion than that each by negligent conduct helped to bring on the accident. There is no escape from that result. *Fitzgerald* v. *Boston Elevated Railway*, 194 Mass. 242. *Kennedy* v. *Worcester Consolidated Street Railway*, 210 Mass. 132, 134. *Northern Pacific Railroad* v. *Freeman*, 174 U. S. 379.

The female plaintiffs were guests of Pigeon and therefore entitled somewhat to rely upon him. *Shultz* v. *Old Colony Street Railway*, 193 Mass. 309. But each testified that she was not relying upon the care of Pigeon but was exercising care for herself. The circumstances show that each one was acting on her own

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account for her own protection and that the negligence of each was a contributing cause of the injury to each. The case is distinguishable from *Bullard* v. *Boston Elevated Railway*, 226 Mass. 262.

The ruling that as matter of law the plaintiffs could not recover, was right. The force of St. 1914, c. 553, does not require the submission of such cases as these to the jury. *Duggan* v. *Bay State Street Railway*, *ante*, 370.

According to the terms of the stipulation, let the entry in each case be

Judgment for the defendant.

ANNIE MERCIER, administratrix, *vs.* UNION STREET RAILWAY COMPANY.

Bristol. February 6, 7, 1918. — May 27, 1918.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Negligence, Contributory, Street railway, Causing death. *Street Railway*. *Witness*, Cross-examination. *Evidence*, Relevancy. *Practice, Civil*, Opening statement of counsel.

In an action by an administrator against a street railway corporation under St. 1906, c. 463, Part I, § 63, as amended by St. 1907, c. 392, for causing the death of the plaintiff's intestate after he had alighted from a car of the defendant by his being struck and instantly killed by another car of the defendant coming on a parallel track from the opposite direction, there was evidence that the stopping place where the plaintiff's intestate alighted was in a sparsely settled neighborhood in the country where there was a plank crossing of the defendant's tracks that led to a lane on which there were some camps, one of which was the intestate's, that the night was a dark one, that the double tracks of the defendant were at the side of the highway with swamps and wooded land beyond them and were more than seven feet from the wrought part of the highway, that three other passengers got off when the intestate did, that when the car stopped for them to alight the conductor called out, "Watch the car in back," or words to that effect, and that there were several cars following on the same track. The three other passengers that got off when the intestate did testified that the intestate when he left the car looked back at the car following on the same track, which had its searchlight on, and then started to cross the parallel track when he was struck and killed by another car of the defendant, which came from the opposite direction without giving any signal and with no lights visible or with a single headlight; that the intestate either was looking in the direction opposite from the car that struck him or was looking straight ahead, that two of the three other passengers saw his peril and shouted to warn him but that he appeared not

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to hear them and walked on until he was struck. *Held*, that, although, if the accident had happened before the passage of St. 1914, c. 553, so that the burden would have been on the plaintiff to show due care on the part of the intestate, there would have been no evidence to go to the jury on this issue, yet, with the presumption of the intestate's due care created by the statute and the burden placed on the defendant to prove contributory negligence, it could not be ruled as matter of law that the negligence of the intestate contributed to his death, and the question of his negligence was for the jury.

In the case above described it was *said* that it was not necessary in that case to determine whether St. 1914, c. 553, § 2, made any change in the degree of care on the part of the person killed which is required by the statutes imposing penalties for causing death, it being expressly made applicable to those statutes by § 1, in which it is provided that "the person . . . killed shall be presumed to have been in the exercise of due care."

If on a dark night a motorman is operating an electric street railway car on a country road where the double tracks of the street railway are laid at the side of the road next to swampy and woody land, and is approaching a crossing leading to some camps where cars often stop and where he knows that passengers alighting from a car coming from the opposite direction on the other track must get out at the extreme side of the road and must cross the track on which he is running his car in order to get to the wrought part of the highway, and where a car has in fact stopped to discharge passengers only a moment before, and if the motorman is so blinded by the lights of motor cars on the highway that he cannot see clearly, it cannot be ruled as a matter of law that it is not negligent for him to proceed under these circumstances to run over the crossing leading to camps at the rate of twenty miles an hour after shutting off his headlight.

In the case above described it also was *held* that it was no evidence of negligence on the part of the conductor of the car from which the plaintiff's intestate had alighted that his warning to the passengers was confined to the car following and did not refer to the car coming on the other track, he having given no assurance of safety from that source of danger.

In the same case it was *pointed out* that the intestate had ceased to be a passenger of the defendant when he had alighted from the car.

In the case above described the defendant called as a witness one of the passengers on the car that struck the intestate, who on his direct examination testified "that the car was going at about the regular speed that it usually runs; that he could not tell just how many miles an hour it was going." On his cross-examination by the plaintiff he testified that the car "was going at what seemed to him about the usual speed." He then was asked by the plaintiff, "Don't you know that the usual speed there is forty miles an hour?" The presiding judge excluded the question, subject to the plaintiff's exception. *Held*, that the exclusion of the question was within the discretion of the presiding judge, which appeared to have been exercised wisely.

In the case above described there was evidence that when the accident occurred the car from which the plaintiff's intestate had alighted had started again and there was no evidence that that car was stationary at the time it was passed by the car that struck the intestate. Subject to the plaintiff's exception, the judge excluded evidence of a rule of the defendant governing the conduct of motormen "passing standing cars." *Held*, that the exclusion was proper, the rule being inadmissible upon the facts shown.

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In the case above described the presiding judge, who ordered a verdict for the defendant, as a matter of right at the request of the plaintiff and against the objection of the defendant allowed the insertion in the plaintiff's bill of exceptions of a statement of the opening to the jury by the defendant's counsel. There was nothing in the opening to indicate that it was intended as an admission or that it differed in any essential particular from the evidence afterwards introduced by the defendant. *Held*, that the opening of the defendant's counsel was not a part of the record and that a statement of it ought not to have been included in the bill of exceptions.

TORT by the administratrix of the estate of Joseph Mercier under St. 1906, c. 463, Part I, § 63, as amended by St. 1907, c. 392, for causing the instant death of the plaintiff's intestate at about a quarter past eleven o'clock on Saturday night May 20, 1916, at Howland's Crossing in Westport when the intestate had alighted from an electric street railway car of the defendant on which he had been a passenger and was crossing the parallel track of the defendant, where he was struck by another car of the defendant coming from the opposite direction. Writ dated June 14, 1916.

In the Superior Court the case was tried before *Morton* J. The evidence is described in the opinion. At the close of the evidence, on a motion filed by the defendant, the judge ordered a verdict for the defendant; and the plaintiff alleged exceptions. At the request of the plaintiff, against the objection and subject to the exception of the defendant, the judge allowed, as a matter of right and not of discretion, the insertion in the bill of exceptions of a statement of the defendant's counsel's opening to the jury.

In the course of the trial one Robinson, called as a witness by the defendant, testified that he was a passenger on the car that struck the plaintiff's intestate and "that the car was going at about the regular speed that it usually runs; that he could not tell just how many miles an hour it was going." On cross-examination he testified "that it was going at what seemed to him about the usual speed." He then was asked, "Don't you know that the usual speed there is forty miles an hour?" The judge excluded the question and the plaintiff excepted.

St. 1914, c. 553, is as follows:

"Section 1. In all actions, civil or criminal, to recover damages for injuries to the person or property or for causing the death of a person, the person injured or killed shall be presumed to have

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been in the exercise of due care, and contributory negligence on his or her part shall be an affirmative defence to be set up in the answer of, and proved by the defendant.

"Section 2. All acts and parts of acts inconsistent herewith are hereby repealed.

"Section 3. This act shall take effect upon its passage, but shall apply only to actions or causes of action hereafter accruing.

"Approved May 21, 1914."

C. R. Cummings, for the plaintiff.

D. E. Hall & C. A. Wilson, for the defendant.

RUGG, C. J. The plaintiff's intestate alighted from a car between eleven and twelve o'clock on a dark night in a sparsely settled neighborhood in the country where the double tracks of the defendant were upon the southerly side of the highway and more than seven feet from its wrought part. He had come as a passenger from Fall River, and the car upon which he had travelled was on its way to New Bedford. The place of the accident was at a crossing leading from the highway to a lane where were some camps. The crossing consisted of planks against the rails. For a mile both to the east and to the west were no intersecting roads, and the land on one side of the tracks was swampy and wooded. Three other passengers got off at the same place, and the car started on its way. The tracks for at least a mile on each side ran in a straight line and the grade was nearly level one way and ascending the other. The direction of the tracks was approximately east and west. The car was an open one, but the curtains in front and on its left or north side were all down, so that a passenger could not readily see out on those two sides. There was plenty of testimony tending to show that when the car stopped the conductor called out "Watch the car in back," or words to that effect, and that there were several cars following on the same track. The narratives of the three passengers who left the car at the crossing, respecting the actions of the deceased and the circumstances which attended him, were in substance these:

One Tolley testified that the deceased, when he left the car and was on the ground, looked back at the car following on the same track, which had its searchlight on, and the car they had left started up; after that the deceased started to cross the track, but before he could get across, the car from New Bedford struck him.

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Up to that time there had been no signal given from that car; "the witness did not see any lights on it burning, and that he was looking, and that up to that time he had not seen that car coming from New Bedford. . . . When he turned round and looked at this car, he did not see any lights on it." The witness was going to a camp in the opposite direction from the course pursued by the deceased. He testified on cross examination that he did not notice any light on the car approaching. "He wasn't paying any attention as to whether any car was coming from New Bedford after he alighted. . . . He didn't mean to say that the ordinary headlight and the ordinary lantern were not on the front end of the car that came in contact with" the deceased. "When he turned round and looked at it [the car from New Bedford], the front part had passed him and he couldn't see any lights and that he didn't see the front part of it at all; that, if there was a searchlight on the car, he couldn't see it; that he wouldn't say and did not mean to say that there wasn't a lantern and an ordinary headlight on the front end of the car; that he did not know."

One Gagnon testified that the deceased "got off the car, turning to his right, walking to the rear of the car and crossing the crossing on the other side, and looked toward Fall River; and proceeded on, walking across the track, and then he was caught by the car coming from New Bedford;" that the car gave no signal; that the car from which they alighted passed the crossing, and that the rear platform was "hanging over the crossing;" that he saw the car from New Bedford because he "put his head out on the north side of the car" before he alighted and "saw the other car coming from New Bedford and at that time the other car had its searchlight going." He knew where the deceased lived and anticipated that he "would go out on the street and walk up toward his camp;" that after starting up the lane, he thought of the car from New Bedford and turned around and "tried to holler at him, but it was too late;" that he saw the deceased as he started to turn and look toward Fall River, but did not see him again until he was on the track where he was struck.

One Howland testified that he was sitting on the front seat of the car, that after stepping off the car he glanced down the track toward New Bedford and saw the car coming and saw its headlight; that he saw the deceased getting off the car and he "pro-

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ceeded to go around the rear of the car;" that "at first, the witness did not think that Mr. Mercier [the deceased] was going to cross, and when he saw that Mr. Mercier was going round the rear, the witness shouted at him not to cross for there was a car coming; that Mr. Mercier didn't show any signs of hearing . . .; that the witness started to see if he could get near enough to Mr. Mercier to warn him; that when the witness hollered, the car on which the witness had been riding was starting up and was making noise; that when Mr. Mercier started round the car, the witness started to follow him, and when the witness was in the middle of the southbound track, Mr. Mercier was in the middle of the northbound track, and the car hit him; . . . that he didn't notice whether there were any other lights on the front" of the car from New Bedford "besides the big headlight, that blinded him (witness) so that he could not see;" that the witness, having seen that car coming from New Bedford and the car from which they had alighted having started, saw Mercier go round back of the car from which they got off; that the witness saw that Mercier was in danger and witness shouted to him as loud as he could, but Mercier kept right on; that the witness ran; "that he could see Mr. Mercier as he walked across; that Mercier was walking with his head straight ahead; that the witness didn't notice that Mr. Mercier looked to the right or to the left; that so far as witness saw, Mr. Mercier walked straight ahead with his face straight ahead, walking at an ordinary gait, not hurrying. . . . It was dark and I could not discern whether he looked one way or the other; . . . that the witness shouted as loud as he could . . . and that Mr. Mercier did not stop."

The motorman of the car which struck the deceased testified that the first thing that directed his attention to the accident was the breaking of glass near the crossing; that at that time his car was going about twenty miles an hour; that about two hundred feet before he reached the crossing he blew his whistle; that nothing interfered with his vision except headlights on automobiles in the highway, which blinded him so that he could not see, and he thereupon threw off his arc light in accordance with one of the rules of the defendant; that he saw the car from Fall River going toward New Bedford about three hundred feet from the scene of the accident, and that he did not see the intestate before striking him.

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When asked whether he could see the crossing, he replied, "I could see part way over on the inner rail, but I couldn't see clear on to the other side. I could see the crossing in front of me in the distance and a little way beyond the crossing;" that the witness did not notice the other car stop; that he was watching the automobiles coming on the road; that it was his duty to look out for other cars that are coming, and to watch when they stop to let off passengers; that the lights from the automobiles struck his window when he was about two hundred feet from the place of the accident and blinded him so that he could not see anything; that he could not tell whether men got off the car or not, but knew that passengers might have gotten off.

There was other evidence much more favorable to the defendant, but that is now immaterial because in this inquiry the evidence must be considered in its aspect most favorable to the plaintiff.

Before the enactment of St. 1914, c. 553, there would have been no case for the jury. The evidence would not have been sufficient to support a finding that the burden of proof resting upon the plaintiff to show that her intestate was actively and actually in the exercise of due care had been sustained. *Kennedy* v. *Worcester Consolidated Street Railway*, 210 Mass. 132. *O'Brien* v. *Boston Elevated Railway*, 217 Mass. 130. *Adams* v. *Boston Elevated Railway*, 219 Mass. 515. *Hayes* v. *Boston Elevated Railway*, 224 Mass. 303. *Cohen* v. *Boston Elevated Railway*, 202 Mass. 66. But important changes have been wrought by that statute. The burden of proving contributory negligence is now placed on the defendant and the person injured is presumed to have been in the exercise of due care. All the facts surrounding this injury are not in evidence. The conduct of the deceased is not fully disclosed by the evidence. There are crucial points upon which it is silent.

The record is bare of testimony as to the appearance of the car from New Bedford as one might have seen it from the position of the deceased just before he stepped into a place of danger. Whether the searchlight was turned off before he reached a point where he could have seen it, whether there were other lights on its forward end after the searchlight was turned off, whether the car was lighted inside and, if so, whether these lights by reason of the structure of the car or otherwise were such as to be visible to one nearly in

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front on such a dark night, were questions about which there was no evidence and about which a specific finding was not required. Whether, also, the lights from nearby automobiles may have blinded the deceased, or otherwise confused him respecting the on coming car are matters as to which there was no direct evidence. Whether he heard the warning shouts of Howland and Tolley is a subject touching which there is no evidence. Whether he looked in the direction of the car from New Bedford, and if he did, what he might have seen, are matters somewhat conjectural even in view of Howland's testimony. Although the evidence, with all its inferences, points strongly toward want of care on the part of the deceased, it is not of such nature that a ruling can be made that the defendant as matter of law has sustained the burden of showing that the negligence of the deceased was a cause contributing to his death.

Although under some circumstances the evidence may be such as to require a ruling as matter of law that the burden of proof resting on a party has been sustained, where the evidence consists of conflicting oral testimony, or where on all the facts, more than one inference rationally may be drawn, it is a question of fact and cannot be ruled as matter of law. *Duggan* v. *Bay State Street Railway*, *ante*, 370, where the meaning and effect of St. 1914, c. 553, is discussed at large. The case at bar falls within the general rule and is not an exception to it. See *Grant* v. *Boston Elevated Railway*, 229 Mass. 219. If reference be had to Federal cases where the presumption and burden of proof are like those established by the statute, the case at bar resembles *Baltimore & Potomac Railroad* v. *Landrigan*, 191 U. S. 461, rather than *Northern Pacific Railroad* v. *Freeman*, 174 U. S. 379.

It is not necessary to determine whether St. 1914, c. 553, § 2, has made any change in the degree of care required in cases arising under the penalty death statutes. If it be assumed that the rule of *Hudson* v. *Lynn & Boston Railroad*, 185 Mass. 510, remains unaffected, the presumption as to due care raised by the first section of the statute is co-extensive with the requirements of that rule, for it expressly is made applicable to actions or indictments for the recovery of damages for causing death.

The question of the negligence of the motorman of the car which struck the intestate was a fact to be decided on all the evi-

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dence. It might be found that he ought to have known, or at least ought to have acted on the theory, that passengers may have left the car from Fall River, and that therefore he ought to have sounded his whistle as he approached the crossing, or diminished the speed of his car, or otherwise made sure that one about to cross was warned in some way on such a dark night of the approach of his car. Whether he ought to have inferred from all the facts known to him that the car from Fall River had stopped at this crossing and had discharged passengers, who would be likely to cross to the main part of the highway, were matters to be settled by the application of sound judgment and could not have been ruled as matters of law.

Each case of this kind depends in large part upon its peculiar facts. The case at bar is not an instance of people getting or being upon the tracks at an hour or place where no rational expectation ought to anticipate such a thing, like *Kupiec* v. *Warren, Brookfield & Spencer Street Railway*, 196 Mass. 463, *Johnson* v. *Guffey Petroleum Co.* 197 Mass. 302, and *Singer Sewing Machine Co.* v. *Springfield Street Railway*, 216 Mass. 138, and it is not the sudden incursion of pedestrians in front of a car at a place where no one could reasonably foresee such an event, like *Donahue* v. *Massachusetts Northeastern Street Railway*, 222 Mass. 233, and *O'Donnell* v. *Bay State Street Railway*, 226 Mass. 418. The car which struck the deceased was approaching a place where cars frequently stopped to leave passengers, where one had in fact stopped a moment before; where passengers in the exercise of due care must get off the car at the extreme side of the highway and in order to reach the wrought path must pass over the tracks. It hardly could have been ruled as matter of law under these circumstances that it was not negligent for a motorman, so blinded by the lights of automobiles nearby that he could not see clearly, to proceed at the rate of twenty miles per hour after shutting off his headlight. There was no evidence of negligence on the part of the conductor of the car on which the deceased was a passenger. His warning, even if confined to the car following and not directed to the one coming on the other track, was no assurance of safety in that particular, and no evidence of negligence. *Blackwell* v. *Old Colony Street Railway*, 193 Mass. 222.

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The intestate ceased to be a passenger of the defendant when he had alighted from the car, and he was no longer entitled to the protection of a passenger. *Creamer* v. *West End Street Railway*, 156 Mass. 320. *Thompson* v. *Gardner, Westminster & Fitchburg Street Railway*, 193 Mass. 133. *Niles* v. *Boston Elevated Railway*, 225 Mass. 570.

The exclusion of the question to the witness Robinson, as to the speed of the cars being forty miles per hour, was within the discretion of the presiding judge, which appears to have been exercised wisely.

The rule of the defendant governing the conduct of motormen operating cars "passing standing cars" was inadmissible upon the other facts shown. There was no evidence that the car from which the deceased had alighted was stationary at the time it was passed by the car in control of the motorman whose negligence is alleged to have caused the fatal injury.

The opening of the defendant's counsel ought not to have been included in the bill of exceptions. It is not permissible as matter of right in the ordinary case. Of course, when admissions are made in the opening or otherwise in the course of a trial, they have binding force. *McMahon* v. *Lynn & Boston Railroad*, 191 Mass. 295, 299. But that does not mean that openings of counsel become parts of the record of a trial. Openings commonly are not made for the purpose of expressing admissions, and, as the trial progresses, there may be changes in the contentions of counsel. *Commonwealth* v. *Retkovitz*, 222 Mass. 245, 252. There is nothing in the opening as printed to indicate that it was intended as an admission or that it differed in any essential particular from the evidence introduced by the defendant.

Exceptions sustained.

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EDWIN P. LINDSAY *vs.* JESSE G. SWIFT & others.

Suffolk. March 12, 14, 1918. — May 27, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Equity Pleading and Practice, Master's report. *Equity Jurisdiction*, For an accounting, Fraud. *Trust*, Fiduciary relation of agent or employee. *Agency*, Duty of fidelity.

Where a suit in equity is referred to a master under a rule directing him "to hear the parties and their evidence, to find the facts, and report the same to the court," the master has no authority to transmit to the court at the request of one of the parties certain portions of the evidence which the master has refused to make a part of his report, and, where in such a case portions of the evidence are transmitted by the master without an order of court directing it, they cannot be considered.

In a suit in equity, by a dealer in white and manila paper against the former manager of the plaintiff's manila department and a corporation of which he had obtained control at the time that he severed his connection with the plaintiff, for an accounting, on findings made by a master it was *held* that the individual defendant had violated no duty to the plaintiff in regard to the plaintiff's manila department, that the parties understood that their contract was about to be terminated at a fixed date for which arrangements were being made, and that the individual defendant rightfully could seek employment elsewhere or negotiate for other business connections for his own sustenance, protection and advantage, and that, in view of the findings of the master, it could not be said that a certain paper bag company, for which the plaintiff had held the exclusive agency in a defined territory, in exercising its legal right to make the defendant corporation its exclusive agent in that territory was induced to cancel the plaintiff's agency through the individual defendant's unlawful procurement, that there was no evidence to support the allegations of fraud, conspiracy and breach of fiduciary duty contained in the plaintiff's bill and that the bill should be dismissed as against both defendants.

BILL IN EQUITY, filed in the Supreme Judicial Court on October 3, 1910, by Edwin P. Lindsay of Boston, a dealer in white and manila paper, who formerly carried on that business as a member of the firm of D. F. Munroe and Company, and, after the death of his partner D. F. Munroe, continued to carry on the business individually under the firm name, against Jesse G. Swift of Boston, William H. Claflin of Boston and William H. Claflin and Company, Incorporated, a corporation, alleging that the defendant Swift was employed by the plaintiff as manager of the manila depart-

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ment of the plaintiff's business and that that defendant by reason of the confidential character of his contract of employment stood in a fiduciary relation toward the plaintiff and that he betrayed the trust and confidence reposed in him by entering the employ of the defendant corporation and becoming its president and acquiring a substantial part of its capital stock, and that the defendants wrongfully procured and took away from the plaintiff the exclusive agency in a designated territory of the Continental Paper Bag Company, a corporation having its principal place of business in New York, for which the plaintiff had been the exclusive agent in the States of Massachusetts, Rhode Island, New Hampshire and Vermont.

The first and second prayers of the bill were as follows:

"1. That an accounting may be taken of the amount of profits which have accrued to the defendant William H. Claflin Company, Inc., out of its exclusive agency for the sale of the product of the Continental Paper Bag Company, and that a decree be entered ordering the payment of an amount so found upon accounting to the plaintiff; or, in the alternative, that judgment for said amount be entered in favor of the plaintiff as against all the defendants, and execution issue thereon.

"2. That an account be taken of the shares of stock and any other consideration paid by the defendants Claflin and the Claflin Company, or either of them, to the defendant Swift as and for a compensation for his violation of duty and betrayal of trust in connection with the transfer of the exclusive agency of the Continental Paper Bag Company ffom the plaintiff to the defendant corporation."

The case was referred to a master by an order directing him "to hear the parties and their evidence, to find the facts, and report the same to the court."

The master filed a report in which he made the findings that are stated in the opinion. In regard to the request of the defendants to report the evidence, his report contained the following statement: "The defendants, in their written objections, have requested me to report to the court all the testimony and all the exhibits in the case. The testimony is voluminous, comprising over one thousand typewritten pages, and some of the exhibits (the books of account of D. F. Munroe and Company)

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are of large bulk. I decline to report all the testimony and all the exhibits unless directed so to do by the court. Such parts of the testimony and such exhibits (excepting said books of account) as the defendants, in their objections, have specifically referred to, I submit herewith under a separate cover."

The case came on to be heard by *De Courcy*, J., upon the exceptions of the respective parties to the master's report, whereupon the parties waived their exceptions and the case was reserved by the single justice for determination by the full court on the pleadings and the master's report with the exhibits attached thereto.

S. L. Whipple, (*W. S. Youngman* with him,) for the plaintiff.

C. F. Choate, Jr., (*H. Albers* with him,) for the defendants.

BRALEY, J. The master states that the original order of reference directed him "to hear the parties and their evidence, to find the facts and report the same . . . with such portions of the evidence as either party may request." But on the record, the interlocutory decrees appointing him and giving directions as to his duties not having so provided, he was without authority to transmit at the request of the defendants the portions of the evidence annexed to the report, and it cannot be considered. If either party desired the whole or any part reported, application therefor should have been made to the court. *Ginn* v. *Almy*, 212 Mass. 486, 500.

The master has found that for some time before the association of the defendant Swift, hereafter designated as the defendant, with the firm, the plaintiff and one D. F. Munroe were dealers in paper under the firm name of D. F. Munroe and Company. The organization, herein referred to as the Munroe Company, consisted of two departments, one known as the white paper department and the other as the manila department forming comparatively the smaller part. The plaintiff upon the death of Munroe, which occurred some ten months after the defendant had become connected with him, purchased Munroe's interest and continued the business under the name of the old firm. The white paper department thenceforth was solely under the control of the plaintiff, who, also using the firm name, acted as selling agent for two paper mills, but the manila department was conducted and controlled under an arrangement with the defendant, described in the bill as constituting him manager of the manila

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department sustaining fiduciary relations to the plaintiff. While no contract in writing ever was made, the master reports that, upon being informed by the defendant who was then the secretary of a corporation dealing in part in manila paper, that he intended to engage in business for himself, the plaintiff proposed that the defendant should become connected with the firm taking charge of the manila department, which was to be enlarged and extended. The defendant having accepted, the parties in substance agreed that the manila department should be under the management of the defendant and conducted separately from the other business, although the Munroe Company was to furnish gratuitously all necessary capital as well as giving to the manila department the use of the offices, storehouse and other facilities for the transaction of business, but whatever necessary expenses remained were to be borne by the department. The defendant agreed to "bring to said department all the business he controlled or could acquire and certain salesmen, familiar with the trade, and should devote his best efforts and his entire time to the management thereof; and that the profits of the department should be divided equally between D. F. Munroe and Company and said Swift." The agreement also provided that certain merchandise representing the defendant's interest in the corporation should be deposited in the Munroe Company's warehouse, and when sold the proceeds were to be paid to him. The defendant thereupon became manager of the manila department and until their relations were severed the agreement, which was not limited in time, and after Munroe's death "continued to be the basis of the relations" between the parties although the defendant submitted to the plaintiff the draft of a contract "defining their agreements and arrangements more fully" which he declined to sign. The master also states, in paragraph two, that while under the original agreement the defendant did not receive interest on money not withdrawn from the business, it later was agreed that interest at six per cent should be allowed on whatever sums he did not choose to withdraw. It is found explicitly that the defendant confined his activities entirely to the management of the manila department which was carried on separately from the white paper department, and had no interest in and nothing to do with the other business of the Munroe Company. He solicited trade, directed the purchase and sale of

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merchandise, hired the employees, attended to the correspondence, dealt with customers, collected debts, and did what he could to make the department successful. When the defendant assumed the management certain office fittings belonging to the Munroe Company were turned over to the manila department, but thereafter all furniture and equipment needed for that department were charged to it, together with all losses from bad debts or trade losses, and all depreciation therewith connected. "To some extent it even competed with" the white paper department. A separate set of books was kept although the bank or cash accounts of the two departments were not separated. The plaintiff under the original agreement was required to furnish whatever capital might be required, and this he did. He also retained possession or control of all the funds and money of the manila department, and the proceeds of sales of merchandise, which were deposited in the bank account standing in the name of the Munroe Company. If money was to be hired the notes were signed in the name of the company, and all bills, notes, debts and expenses were paid by the plaintiff in cash or by checks drawn by him on the bank account of the company. The parties never held themselves out as copartners, and all the business, in so far as those who dealt with them were concerned, was transacted under the name of the Munroe Company, although occasionally the plaintiff as well as the defendant referred to the other as "his partner," and also as "manager of the manila department of D. F. Munroe and Company" or as "manager of D. F. Munroe and Company."

The essential elements of the parol agreement as modified by the allowance of interest to the defendant are not ambiguous. The defendant engaged to give his entire time and devote his best efforts in the management of the manila department which as between the parties was treated as distinct from the white paper department and the plaintiff's agency. In the accomplishment of the enterprise the master finds that the plaintiff exercised no personal supervision or control over the defendant who was free to transact the business of the manila department in his own way as to hiring of salesmen, making of purchases and sales, the selection of customers and giving credit.

The defendant contended before the master that having been a business arrangement for their mutual and common benefit to

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which the plaintiff acting under the name of the Munroe Company contributed the necessary capital and certain business facilities, while he put in his services, all the business controlled by him, or which he could acquire, and certain salesmen familiar with the trade, and whatever profits accrued were to be divided equally, enough appears to warrant a finding that as between the parties a partnership existed under *McMurtrie* v. *Guiler*, 183 Mass. 451, 453, and cases cited; *Estabrook* v. *Woods*, 192 Mass. 499; *Phipps* v. *Little*, 213 Mass. 414; *Arnold* v. *Maxwell*, 223 Mass. 47, 49, and *Deutschman* v. *Dwyer*, 223 Mass. 261, 264. The plaintiff however insists that notwithstanding the terms of the contract and the manner of performance by the parties, the defendant was merely his servant.

The master before whom these conflicting positions first were taken having reviewed their relations in the light of evidence not reported, although his essential findings, which we have previously stated, appear, concludes, that "Whether, on the facts above stated . . . their relationship should be regarded as that of copartners . . . or that of employer and employee, with the rights and duties of such, is a question on which I make no finding or ruling, as it seems to me to be a question of law for the court rather than a question of fact for the master." The question is one of mixed law and fact well within the master's authority to have decided. *Gunnison* v. *Langley*, 3 Allen, 337. *Bradley* v. *Borden*, 223 Mass. 575. But, even if left open, we do not find it necessary to define technically the legal character of their contractual obligations. It is plain that however denominated the relation was one of mutual trust and confidence. It is not material whether it be characterized as a partnership, or as that of master and servant or of principal and agent. The defendant in either capacity was bound to act in good faith, and could not without the plaintiff's knowledge or assent enter into adverse transactions, or make a profit out of, or deal with the business for his own benefit except as stipulated, while the contract continued in force. *Cutter* v. *Demman*, 111 Mass. 474. *Greenfield Savings Bank* v. *Simons*, 133 Mass. 415. *Quinn* v. *Burton*, 188 Mass. 466. *Randall* v. *Peerless Motor Car Co.* 212 Mass. 352. See *Hayes* v. *Hall*, 188 Mass. 510, 511.

The manila department under the defendant's efforts prospered greatly, and in October, 1908, having "become dissatisfied with

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his half share of the net profits," he suggested to the plaintiff "that he thought he ought to have two thirds." The plaintiff made no definite reply, saying that he would consider it, and the master reports that, notwithstanding later conversations in which the basis for a new agreement was discussed, no definite understanding for the future was reached except that it was mutually understood that their relations as they had existed in the past should continue until January 1, 1909, or in other words, their business relations were then to terminate. *Karrick* v. *Hannaman*, 168 U. S. 328. While the question on the part of each of making new arrangements between themselves was pending, the defendant, unknown to the plaintiff but at the solicitation of the Claflin Company, entered into negotiations with that company, the defendant corporation, which ended in an option shortly before December 29, 1908, whereby the defendant was to have the right to buy a majority of the stock and become the manager of the corporation, controlling the business. It was at this time a customer of the plaintiff of both kinds of paper. The plaintiff as the Munroe Company also had the exclusive agency within the territory described in the bill for the sale of the products of the Continental Bag Company, a large manufacturer of paper bags and other forms of manila and fibre papers, with which the defendant on December 30, 1908, conferred, stating that he and the plaintiff had agreed to separate, and that he held an option on a majority of the stock of the Claflin Company. The bag company thereupon agreed that if the option were exercised it would transfer its business to the Claflin Company, and the defendant then said that he would exercise the option, which he subsequently did, and the bag company on December 30, 1908, withdrew its agency with the plaintiff which existed under a parol contract terminable at the will of the first company, and on the same date wrote the Claflin Company that if the defendant acquires "control of your company" we "hereby appoint you . . . our sole and exclusive agents for the sale of paper bags . . . for one year from January 1, 1909."

The plaintiff alleges that these transactions are severally a breach of trust which entitles him to an accounting and to compensation in damages. But the purchase of the stock with the resultant corporate control was not a violation of any duty connected with the manila department. The parties from the tenor

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of the entire report must have mutually understood, as previously said, that their contract would be terminated on a fixed date for which arrangements were being made, and the defendant meanwhile rightfully could seek employment elsewhere or negotiate for other business connections for his own sustenance, protection and advantage. *American Stay Co.* v. *Delaney*, 211 Mass. 229, 232. The report contains no finding that he proposed to appropriate the patronage of one of the plaintiff's customers, even if, as a result of the acquisition of the stock, the corporation might buy from other parties in the future.

As to the bag company it is immaterial that the agency originally was procured through the defendant's efforts, of whose experience and ability in selling its product the company wished to avail itself. The agency had become part of the business which the defendant could not filch away. *Moore* v. *Rawson*, 185 Mass. 264. *Essex Trust Co.* v. *Enwright*, 214 Mass. 507. *Arnold* v. *Maxwell*, 223 Mass. 47. The master however finds, that both the plaintiff and the defendant in anticipation of the separation respectively sought to control the agency and each, apparently without the knowledge of the other, had put his view of the matter before the managing officers. The defendant's relations with them were much more friendly and intimate than their relations with the plaintiff, and in the manila department "for some years he managed the agency of their company to their satisfaction. They desired that he should continue to manage it, provided he was connected with a responsible and established concern. It did not, therefore, require any urging" on the defendant's "part to induce them to transfer the agency from" the Munroe Company to the Claflin Company after the defendant had told them that he "had obtained an option on a majority of the stock of the Claflin Company and that he should exercise said option and associate himself with said company."

In view of these findings the allegations of fraud and conspiracy, while sufficiently stating a breach of fiduciary duty, are not sustained by the report. It certainly cannot be said as matter of law that the paper bag company, having acted under the exercise of its own legal rights, was induced to cancel the plaintiff's agency through the defendant's unlawful procurement. What has been said also disposes of any ground of relief as against the defendant the Claflin Company, and the result is, that an inter-

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locutory decree is to be entered confirming the master's report followed by a decree dismissing the bill with costs.

Ordered accordingly.

RALPH W. REDMAN & another, executors, *vs.* ELLA I. CHURCHILL.

Norfolk. March 14, 1918. — May 27, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Devise and Legacy. Husband and Wife. Gift.

A devise and bequest of a testator to his wife of one third part of the real and personal property "belonging to me and standing in my name, but no part of the real or personal property held by me as executor or trustee of the estate of my mother" entitles the widow to no right to share in certificates of stock and mortgages which the testator before his death transferred and assigned to himself as the executor of his mother's will.

In the case in which the point above stated was decided, it appeared that the property which the testator assigned and transferred to himself as the executor of his mother's will amounted in value to at least $50,000, that the assignments and transfers were made for the purpose of preventing his wife from receiving any part of this property and that the executor of the testator's will paid to his widow as one third of the property standing in his name at the time of his death the sum of $825.69, and it was *said*, that, if the question of fraud were open, there was nothing to show that the husband practised any legal fraud upon his wife.

It here was *said* that a husband has a right to give away his personal property during his lifetime without his wife's consent.

It also was *said* that a gift made by a husband to himself as the executor of his mother's will of the greater part of his personal property for the purpose of preventing his wife from acquiring any portion of the property so given by him is valid.

APPEAL from a decree of the Probate Court for the county of Norfolk allowing the first account of the executors of the will of Chauncey S. Churchill, late of Dedham.

The case was heard by *Loring*, J., who reserved and reported it for determination by the full court as follows: "The facts of the case were that the deceased transferred property which was in fact his own to himself as executor of the will of his mother. The amount of property so transferred was not agreed upon but it was agreed that the property so transferred amounted to at least $50,000. The executors did not transfer or otherwise give to the widow of the deceased any of that property. They did not give to the

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widow of the deceased any of that property because by the terms of the will of the deceased the bequest to the widow was 'one third of the property, both real and personal, belonging to me and standing in my name.' I was of opinion that as matter of description the property so transferred by the deceased was not within the legacy thus given by the deceased to his widow and that the decree allowing the account would have to be affirmed, but I stated to counsel that I would reserve the case (without making a ruling) for the consideration of the full court. When the time came for settling the terms of the reservation the appellant wished me to make findings of fact which had to do with a claim made by the appellant that the transfer of this property was fraudulent. I am of opinion that there is no question of fraud involved in the appeal in question. I dislike to make findings of fact on an issue which has not been formulated and which in my opinion is not on trial. If the appellant wishes to raise the question of fraud I am of opinion that he must bring a bill in equity charging that the transfer was made by fraud and that the residuary legatees of his will cannot claim to hold property which comes to them in part under that fraud. Whether such a bill can be maintained in law and whether, if it can be maintained in law, the appellant can in fact make out the necessary allegations of such a bill is not a matter before me and one on which I do not undertake to express a final opinion. Under these circumstances I have come to the conclusion that the best way of administering justice in this appeal will be by entering now *nunc pro tunc* an order appointing the stenographer who took the evidence commissioner to report the testimony and accordingly I have entered such an order. I now reserve the case for the consideration of the full court upon the appeal (including the record of the proceedings in the Probate Court), the objections of the appellant to the decree appealed from and the evidence taken by the commissioner including all exhibits introduced in evidence before me relating to the estates of Perinelia S. Churchill and Chauncey S. Churchill. I also reserve for the consideration of the full court my power to take the action taken by me above, including the making of this reservation."

H. T. Richardson, for the appellees.

W. A. Morse, (*G. M. Poland* with him,) for the appellant.

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CARROLL, J. The appellant is the widow of Chauncey S. Churchill who died October 5, 1914. By his will he gave her one third of his real and personal property "belonging to me and standing in my name, but no part of the real or personal property held by me as executor or trustee of the estate of my mother, Parmelia S. Churchill, or of the property in which I have a life interest and power of disposition by will." The residue of his estate "or over which I have, under the will of my mother or otherwise, the power of distribution," he gave in trust for the benefit of his children. In 1913 he transferred and assigned to himself as executor of his mother's will certificates of stock and mortgages which were in fact his own, to the amount of at least $50,000. The executors filed their account showing a payment to Mrs. Churchill of $825.69, which was one third of the property standing in the name of the husband at the time of his death. This account was allowed in the Probate Court and Mrs. Churchill appealed to the Supreme Judicial Court.

She contends she is entitled to receive from the executors in addition to the amount of $825.69, — which was one third of all the property standing in her husband's name at the time of his death, — one third of the certificates and mortgages which he assigned and transferred to himself as the executor of his mother's will. It was agreed that these assignments and transfers were made for the purpose of preventing his wife from receiving any part of this property. The single justice before whom the case was heard was of opinion that the property conveyed was not within the description "belonging to me and standing in my name," and reserved the case for the consideration of this court.

The language of the will and the evidence of his intention introduced at the hearing, showed that the testator intended to give his wife one third only of the property which he owned and which stood in his name when he died, and did not intend to include in this bequest any portion of the property which he had transferred to his mother's estate and which he held as the executor of her will. The certificates of stock and mortgages, of which Mrs. Churchill now claims a share as legatee under her husband's will, were not his property. They had been transferred and were a part of his mother's estate.

Even if the question of fraud were open in these proceedings,

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there is nothing to show that the husband practised any legal fraud on the appellant. He had the right to dispose of his personal property during his lifetime without her consent, and she cannot impeach a gift made by him as a fraud upon her because made to prevent her from acquiring any portion of it. He could make a gift to himself as executor of his mother's will, and when this was done the property was no longer his. In *Leonard* v. *Leonard*, 181 Mass. 458, it was held that the intent to defeat a claim which otherwise a wife might have, was not enough to defeat a conveyance of the husband's real estate and gifts of personal property. The wife had no right to insist that the husband should hold all the property he owned during his marriage until his death, and such a conveyance or gift is not a fraud on the marital rights of his wife. *Kelley* v. *Snow*, 185 Mass. 288, decided that the right of a married woman to her personal estate, so far as her husband was concerned, was absolute, and she could sell it or give it away provided the conveyance was real and made to take effect in her lifetime. See *Seaman* v. *Harmon*, 192 Mass. 5, where the case of *Brownell* v. *Briggs*, 173 Mass. 529 is distinguished. *Bone* v. *Holmes*, 195 Mass. 495. *Keyes* v. *Carleton*, 141 Mass. 45. The testator had a right to convey to a third person who was the executor of another's will, property which belonged to himself, and he could transfer his own property to himself as executor of his mother's will, by way of gift. At the time of his death the mortgages had been assigned and recorded, the certificates stood in the name Chauncey S. Churchill, executor of the will of Permelia S. Churchill, and all the securities were in a safe deposit box in a bank stamped "Property of Permelia S. Churchill." The gift was accompanied by a sufficient delivery and we must assume from the evidence and the terms of the reservation that the assignment was in proper form to pass the title to the executor.

As the securities transferred to his mother's estate did not belong to the testator and did not stand in his name when he died, and as the executors have paid to Mrs. Churchill one third of all the property which did belong to him and which stood in his name when he died, the decree of the Probate Court allowing the account should be affirmed; and it is

So ordered.

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MATILDA MILLER *vs.* FLASH CHEMICAL COMPANY.
MEYER MILLER *vs.* SAME.

Suffolk. March 18, 1918. — May 27, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Negligence, Of child, Of one in charge of child, In use of highway. *Evidence*, Presumptions and burden of proof. *Practice, Civil*, New trial.

It cannot be ruled as matter of law that a child six years of age is too young to be alone and unattended upon a highway in a city and to pass from one side of a street to the other while on the way to and from school.

In an action by a girl against a corporation to recover for personal injuries received by her when six years of age by being run into by a motor vehicle as she was crossing a street in a city on the way home from school after she had slipped away from a child in whose charge she had been put, the question, whether the plaintiff was of an age capable of exercising due care for her own safety, is for the jury.

The mere fact, that the plaintiff, in the action above described, "never went alone to and from school but always was accompanied by some older person," does not conclusively establish the fact that the plaintiff was not capable of exercising due care for her own safety.

At the trial of the action above described, there was evidence that the plaintiff, having hold of the hand of a child two years older, started to cross a public street in a city; that there was no one else crossing the street at the time and that there were no vehicles upon the street at the time in that vicinity, except the defendant's motor vehicle, which was about forty feet away at the child's left and "coming down fast in the middle of the street;" that, after the two children had gone a few feet from the sidewalk, they separated and the plaintiff went on, unaccompanied, past the middle of the street and was about four feet from the sidewalk on the other side when she was struck by the left hand front wheel of the vehicle. *Held*, that the question, whether the plaintiff exercised that degree of care which under the circumstances she ordinarily would be expected to exercise, was for the jury.

Where, at the trial of the action above described, the defendant asked for no specific instructions and excepted only to the denial of a motion that a verdict be ordered in his favor, and where the evidence warranted findings that the plaintiff was capable of exercising due care in her own behalf and, when injured, was exercising such care and the jury found for the plaintiff, it is immaterial whether the provisions of St. 1914, c. 553, would apply to an action for personal injuries received by a child not capable of caring for herself.

In the above described action, the defendant excepted to the denial of a motion

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for a new trial because of newly discovered evidence and the court *held* that the record showed no abuse of discretion by the judge in denying the motion.

TWO ACTIONS OF TORT, the first for personal injuries received when the plaintiff, a girl then six years of age, was crossing North Main Street in Providence, Rhode Island, from the easterly to the westerly side and was struck by a motor vehicle of the defendant going in a northerly direction. The second action was by the father of the plaintiff in the first for consequential damages. Writs dated June 1, 1915.

In the Superior Court the cases were tried together before *Keating*, J.

The material evidence is described in the opinion. At the close of the evidence the defendant moved that verdicts be ordered for it in both actions. The motions were denied. The defendant asked for no specific instructions. The jury found for the plaintiff in the first action in the sum of $12,500 and for the plaintiff in the second action in the sum of $1,000. Motions for a new trial were filed by the defendant, as described in the opinion. In the second action, the plaintiff remitted all but $200 of the verdict. The motions then were denied. The defendant alleged exceptions.

A supplemental brief filed by the defendant in this court stated, among other things, that "The defendant does not contend that the jury could not have found the defendant's chauffeur negligent."

E. C. Stone, for the defendant.

J. H. Vahey, (*S. K. Casson & P. Mansfield* with him,) for the plaintiffs.

CARROLL, J. These are two actions of tort, — one for personal injuries received by Matilda Miller (hereinafter called the plaintiff), a child six years of age, on June 15, 1914, in Providence, Rhode Island, through the alleged negligence of the defendant's servant in operating an automobile truck. The other action is by her father for consequential damages. Verdicts were returned for the plaintiffs.

There was evidence that the plaintiff never went alone to or from school, but always was accompanied by her sister Rose, eleven years of age. On the day of the injury Rose remained in school and asked Anna Zucca, a child two years older than the plaintiff, "to take Matilda home." It was agreed that Anna, if

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present, would testify: "We came along North Main Street together and got off the sidewalk. . . . I let go of her hand after we walked a few steps on the street; . . . when I let go of her hand I started to run, and I thought she would run after me, . . . I . . . did not know anything happened to her until I had got home." There was evidence that when the plaintiff started to cross from the easterly to the westerly side of the street, it was clear of vehicles except the defendant's automobile, and the only people crossing the street were the two children; that the automobile was forty feet away, "coming down fast" in the middle of the street and going in the direction of Pawtucket; that the plaintiff was struck by the forward left hand wheel when about four feet from the sidewalk on the westerly side of the street.

A child may be so young in years and incapable of exercising care that it is negligence on the part of her parents or custodian to permit her to be alone on the street; and if, when unattended, the child is injured by the negligence of a third person, when an adult exercising ordinary care would not have been hurt, she cannot recover, — the negligence of the person having her in charge being imputed to her. *Casey* v. *Smith*, 152 Mass. 294. But even if the parents, or those having the control of such a child, are negligent in allowing her to go unattended upon a public highway, and she did nothing which would be considered careless if her movements were directed by an adult person of ordinary prudence, she can recover damages for an injury sustained by the negligence of another. *Wiswell* v. *Doyle*, 160 Mass. 42. It cannot be said as matter of law that a child six years of age is too young to be alone and unattended upon the highway and to pass from one side of a street to the other, while on her way to and from school. This is a question of fact for the jury to decide. See *McDermott* v. *Boston Elevated Railway*, 184 Mass. 126. If the plaintiff was old enough to care for herself and the defendant negligently injured her, she has the right to recover for her injuries, provided it was found she exercised that degree of care and caution which was to be expected of a child of her years. *Collins* v. *South Boston Railroad*, 142 Mass. 301. *McDermott* v. *Boston Elevated Railway*, *supra*.

There was evidence that the plaintiff never went alone to or

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from school. Even if the jury believed this, they could find she was capable of caring for herself and used the common care of a child six years of age. *McNiel* v. *Boston Ice Co.* 173 Mass. 570, and cases cited. Cases like *Messenger* v. *Dennie,* 137 Mass. 197; *S. C.* 141 Mass. 335; *Mills* v. *Powers,* 216 Mass. 36; *Garabedian* v. *Worcester Consolidated Street Railway,* 225 Mass. 65, where there was an entire absence of care and the plaintiff's own negligence was a bar to recovery, are not applicable.

When the plaintiff was a few feet from the sidewalk on the right hand side of the street, facing Pawtucket, she was alone: her custodian had left her. She crossed this side of the street in safety and went upon the opposite side and when near the sidewalk was run down by the defendant's automobile, "going very fast." On these facts it was for the jury to say whether the child failed to use the care which under the circumstances she would ordinarily be expected to exercise.

The injury happened June 15, 1914. St. 1914, c. 553, was then in force. The defendant concedes that while the accident happened in Rhode Island, the statute relates to a matter of procedure or remedy, and the law of the forum controls; and contends, relying on *Bullard* v. *Boston Elevated Railway,* 226 Mass. 262, that the presumption of due care by a person injured or killed, created by the statute, does not extend to the person who is the custodian of an injured child. No specific instruction was asked for on this question and the case is before us on motion to direct a verdict for the defendant.

At common law, irrespective of the statute, the jury could find that the plaintiff was not too young to be unattended, and when injured was not in the custody of the elder girl, but was alone and was using proper care, under all the circumstances of the case. They could also find that Anna Zucca was a proper custodian and, in view of her age, no act of hers in controlling the movements of the plaintiff, contributed to the injury. It is therefore unnecessary to consider this question, now raised by the defendant.

There was evidence, if believed, that the driver of the automobile could have avoided the injury; that he was "coming down fast" and was on the wrong side of the highway. But there was also evidence to the contrary, and the jury could have found the

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driver did everything possible to avoid the collision. His negligence was a question for them to decide.

The defendant filed two motions for a new trial, — one because the verdict was against the evidence and the weight of the evidence, the other on the ground of newly discovered evidence. The judge was not bound as a matter of law to grant a new trial because of newly discovered evidence, and we find nothing to show an abuse of his discretion. *Powers* v. *Bergman*, 210 Mass. 346. *Manzigian* v. *Boyajian*, 183 Mass. 125.

Exceptions overruled.

RICHARD W. CUTCLIFFE *vs.* HARRY D. McINTOSH COMPANY.
HENRY WOOD *vs.* SAME.
RICHARD W. CUTCLIFFE *vs.* GEORGE G. HALL.
HENRY WOOD *vs.* SAME.

Suffolk. March 18, 19, 1918. — May 27, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Negligence, Employer's liability, Defective staging, Of one owning or controlling real estate.

At the trial of an action by an employee against his employer to recover for personal injuries caused by the breaking of a board on a staging upon which the plaintiff was working for the defendant who under contract with the person in control of a building was repairing a ceiling in the building, there was evidence that the defendant had furnished suitable materials for a staging to be used by his employees, that, at the invitation of an employee of the person in control of the building, the defendant had adopted for use a staging already erected, that at that time the staging was in proper condition, that later an employee of the person in control of the building laid an additional plank upon the staging, which was the plank which broke and as to the purpose of which the evidence was conflicting. There was no evidence that the defendant knew about this plank being so placed. This plank was defective and, when the plaintiff stepped upon it, it broke and he was injured. *Held*, that the evidence would not warrant a finding of negligence of the defendant.

The plaintiff in the action above described also brought an action against the person in control of the building for the same injuries, at the trial of which there was evidence tending to show that a carpenter in the defendant's employ had built the staging, that the defendant had offered it to the plaintiff's employer

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for use in the work he had to do, that the offer had been accepted and that at that time the staging was adequate and not defective. There was no evidence that the board which broke was placed on the staging by the defendant or by any one for him to be used as a part of the staging. *Held*, that a finding for the plaintiff would not be warranted.

There was further evidence in the action above described that an employee of the defendant assured the plaintiff that the staging was safe. There was no evidence that he had authority so to do. It also appeared that at that time the staging was safe. *Held*, that these additional facts did not warrant a finding for the plaintiff.

TWO ACTIONS OF TORT for personal injuries received by the plaintiffs while in the employ of the defendant Harry D. McIntosh Company on February 19, 1912, (before the workmen's compensation act took effect) with a declaration, as amended, containing a count at common law and a count under the employers' liability act. Writs dated May 29 and July 12, 1912, respectively; also

TWO ACTIONS OF TORT, originally against Anthony D. Hall, George R. Hall, Frank G. Hall and George Gardner Hall, but before trial discontinued against all the defendants excepting George Gardner Hall, by the same employees of the defendant in the actions above described, for the same injuries, the declarations alleging that the injuries resulted from negligence of the defendant or his employees in directing the plaintiffs, while working for their employer in repairing a ceiling in the Adams House for the defendant, to go upon and use a defective staging, which broke. Writs dated December 19, 1912, and August 17, 1914, respectively.

In the Superior Court the four cases were tried together before *Bell*, J. The material evidence is described in the opinion.

At the close of the plaintiffs' evidence, the defendant Harry D. McIntosh Company rested, and no further evidence was admitted as bearing on the first two cases. At the close of all the evidence the judge on motion of that defendant ordered a verdict for it; and the plaintiffs alleged exceptions.

At the close of all the evidence the judge denied a motion of the defendant Hall that a verdict be ordered for him. The jury found for the plaintiff Cutcliffe against the defendant Hall in the sum of $5,000; and for the plaintiff Wood against the defendant Hall in the sum of $3,600. The defendant Hall alleged exceptions.

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E. C. Stone, for the defendant Hall.

W. I. Badger, Jr., (*L. C. Doyle* with him,) for the defendant Harry D. McIntosh Company.

J. M. Hoy, for the plaintiffs.

CARROLL, J. These actions are to recover for personal injuries sustained by the plaintiffs by falling from a staging on which they were working in the billiard room of the Adams House, Boston. The cases will be considered together. The defendants are the Harry D. McIntosh Company, the plaintiffs' employer, and George G. Hall, proprietor of the Adams House.

It was necessary to repair a portion of the ceiling, and the house carpenter, one Vatcher, in the employ of Hall, built a staging about five feet high above the floor of the billiard room. It rested on six uprights, five feet apart, to which the ledger-boards, of spruce timbers about one and one eighth inches in thickness, were nailed. The staging covered a space eight feet wide and thirty feet long; the planks of which the floor of the staging was constructed were not nailed. The plaintiffs were injured Monday, February 19, 1912. On the Friday or Saturday preceding, Harry D. McIntosh (a member of the firm of Harry D. McIntosh Company) who was in the Adams House examining the work to be done, was asked by Hall if he wanted the staging to remain, and replied that he did. At that time loose planks two or three inches in thickness made up the floor of the staging; "there were no boards on there, . . . nothing but the three planks on the staging, two or three inch plank." On Monday while the men were at work, McIntosh found the same conditions. When the plaintiffs went to work they took additional planks, by order of their superintendent. About one o'clock in the afternoon they were injured by stepping on a pine board seven eighths of an inch thick, eight or ten inches wide and six or seven feet long, which broke. It was described by one witness as full of "cricks, cracks of air;" it was cross grained; and the break was where there was a knot. The plaintiffs contended that the pine board which broke was a part of the floor of the staging, while the defendants insisted that it was not a part of the floor nor intended for that purpose, but was a board called a "furring board," to be cut up and used for furring, to which the wire laths were to be nailed. Powell, the carpenter assisting Vatcher, was on the staging and was using the board, — having

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laid it down a short time before the plaintiffs stepped on it, — it was upon the staging solely for his convenience, so that he would not have to descend from the staging when it was necessary to cut it. There was evidence that the broken board was not suitable for a staging floor and was not safe for men to stand on. The judge ordered a verdict for the defendant in the case against the Harry D. McIntosh Company, and the jury found for both plaintiffs against Hall.

The verdict was directed properly for the Harry D. McIntosh Company. Both plaintiffs were experienced workmen and had extensive skill in building stagings of all kinds. They knew Powell was working with them; and they testified they relied on the assurance of the house carpenter that the staging was safe, and not upon anything said or done by their employer or superintendent. Although the employer intended that the men should use this staging, and knew they were in fact using it, nothing was said to them by any one representing the Harry D. McIntosh Company. They were told to take the necessary material with them for constructing their own staging, and no question is raised but that ample and proper material was supplied them. Their invitation to use the staging came from Vatcher, and they testified that they relied on his assurance that it was safe.

On the morning of the accident when the plaintiffs were using the staging, their employer saw it, and the defective board was not a part of it; it was then in a safe and proper condition. There was nothing to contradict this evidence; and there is nothing to show that the Harry D. McIntosh Company had any knowledge of this pine board or in any way adopted it for the use of its employees. If the staging became defective because this board formed a part of it, this did not happen through the negligence of any one for whom the Harry D. McIntosh Company was responsible. See, in this connection, *Noonan* v. *Foley*, 217 Mass. 566; *Neagle* v. *New York, New Haven, & Hartford Railroad*, 214 Mass. 472; *Colton* v. *Richards*, 123 Mass. 484.

In the case against Hall it appeared that on the Saturday before the accident he assented to the use of the staging by the Harry D. McIntosh Company. At that time, according to all the evidence, the staging was in perfect repair: its flooring was made of safe material, the planks were proper for that purpose, and the pine

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board which broke did not form a part of it. If Hall was responsible he was responsible for the condition of the staging as it then was. He did not undertake to supply a new or additional staging or to do anything more than supply the existing one. He did not agree to take upon himself the duty of furnishing a suitable place for the employees of the Harry D. McIntosh Company to do their work in, as in *Hall* v. *Bates*, 216 Mass. 140. Assuming that Hall, as the owner of the premises, owed to the employees of the Harry D. McIntosh Company the same duty their employer owed them, even then he is not shown to have been negligent. The staging he furnished was in good repair; there was nothing dangerous about it, and no duty rested upon him to warn the plaintiffs who were experienced men. *Pettingill* v. *William Porter & Sons, Inc.* 219 Mass. 347, 349. When the plaintiffs began work, the defective board comprised no part of the staging.

The plaintiffs contend that Hall is liable for the negligence of Vatcher in assuring the plaintiffs that the staging was safe and in ordering them to use it. He is not shown to have any authority to assure the plaintiffs that it was safe, or to excuse them from making such inspection as was necessary for their own safety. Again, at the time they were directed to use the staging it was safe and was in no part defective. The only part complained of is the loose pine board which was not used by the defendant Hall, nor intended by him to be used as a part of the staging; if the plaintiffs believed this pine board was a part of the floor, and the jury could find it was a part of the staging, this did not result from the negligence of Hall who neither knew nor contemplated its use for such purpose.

If this board was left on the floor by Powell, and assuming that the defendant would be responsible for his negligence, it was a mere transitory risk, — one of the incidents of the employment where workmen employed by different contractors are using the same staging. *McCann* v. *Kennedy*, 167 Mass. 23. *Lumbert* v. *Gurney*, 222 Mass. 235, 237.

It follows that in the case of Wood and Cutcliffe against the Harry D. McIntosh Company the exceptions are overruled; in the cases of Wood against Hall and Cutcliffe against Hall, the defendant's exceptions are sustained, and judgment is to be entered for this defendant. St. 1909, c. 236.

So ordered.

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PRESTON B. RUNYAN *vs.* HARRY VAN IDERSTINE, executor.

Suffolk. March 20, 1918. — May 27, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Frauds, Statute of. Contract, To make a bequest. *Attorney at Law.*

The provisions of R. L. c. 74, § 6, prevent the maintenance of an action of contract by an attorney at law against the executor of a will to enforce an oral agreement by the defendant's testator to bequeath to the plaintiff a certain sum of money in payment for services at that time already rendered and to be rendered to the testator by the plaintiff as an attorney at law.

CONTRACT upon an oral agreement by Louisa H. Schubeler, the defendant's testatrix, to pay to the plaintiff $1,000 for professional services rendered and to be rendered to her as her attorney by bequeathing that amount to him in her will. Writ dated October 4, 1915.

In the Superior Court the action was tried before *McLaughlin,* J. The material evidence is described in the opinion. At the close of the evidence by order of the judge the jury returned a verdict for the defendant. The plaintiff alleged exceptions.

J. W. Keith, for the plaintiff.

I. F. Carpenter, for the defendant.

CARROLL, J. This is an action of contract to recover under an oral agreement, by which the defendant's testatrix was to pay the plaintiff for his services as her attorney by bequeathing to him the sum of $1,000. The plaintiff disclaimed any right to recover for the value of his services; he sought to recover solely upon the agreement, and "waived any other right to maintain this action." The defendant's answer was a general denial, the statute of limitations and the statute of frauds. The court directed a verdict for the defendant.

R. L. c. 74, § 6, provides that no agreement to make a will or give a legacy shall be binding unless the agreement is in writing. It is plain, therefore, that the plaintiff cannot recover on the oral agreement upon which he relies; and the fact that the promise was made to pay by legacy for the services which had been per-

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formed, and the services to be performed in the future, does not give the plaintiff the right to recover on the contract. The statute was passed to prevent fraud and perjury, and is a bar to recovering on an agreement where a promise is made to pay a debt by giving a legacy to the creditor. *Emery* v. *Burbank*, 163 Mass. 326.

Exceptions overruled.

JOHN McCARTHY'S CASE.

Suffolk. March 21, 1918. — May 27, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Workmen's Compensation Act, Whether injury arose out of employment.

In a claim under the workmen's compensation act by an employee of a town, who suffered a sunstroke when he was working for the town in a gravel or sand pit on one of the hottest days in summer and when there either was no breeze or none reached the sand pit, the foreman in charge of the work testified before the Industrial Accident Board that the men were told "if it became too hot there that they could quit," and there was nothing to show that the claimant was required to remain in the pit and could not leave the work if he felt affected by the heat or that he was overcome suddenly and had no opportunity to escape. The board decided that the injury of the employee arose out of, as well as in the course of, his employment and awarded compensation, and the decision was affirmed by a decree of the Superior Court. *Held*, that the decree must be reversed and that the case must be recommitted to the Industrial Accident Board to hear the parties on the question whether the employee was at liberty to stop his work in time to protect himself from injury.

APPEAL to the Superior Court under St. 1911, c. 751, Part III, § 11, as amended by St. 1912, c. 571, § 14, from a decision of the Industrial Accident Board awarding compensation to John McCarthy, for an injury received by him on August 2, 1917, when in the employ of the town of Danvers, at the rate of $11.25 a week from August 12, 1917, the eleventh day after his injury, to December 18, 1917, the date of the hearing, amounting to $205.71 and also a weekly compensation of $11.25 until the award should be revised after due hearing as provided by Part III, § 12 of the act, the claim being made under St. 1913, c. 807, accepted by the town of Danvers.

The case was heard by *Chase*, J. The evidence reported is described in the opinion. The judge made a decree in accordance

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with the decision of the Industrial Accident Board; and the insurer appealed.

The case was submitted on briefs.

G. Gleason, for the insurer.

M. J. McSweeney, W. H. McSweeney & F. H. Caskin, Jr., for the employee.

CARROLL, J. John McCarthy, an employee of the town of Danvers, sustained a personal injury from sunstroke while working for the town in its gravel or sand pit. One witness testified that the pit was low, shielded from the north and west, and, while he thought no breeze was blowing on the day of McCarthy's injury, the pit was so situated that a breeze would be shut off, and that the day was one of the hottest of the summer, "sand attracts the sun . . . on a hot day a sandbank is about the hottest place that can be found. . . . The man working in a trench in the street would not feel the heat so much." "A man would rather work anywhere than in the pit on a hot day." The board found the employee suffered a personal injury which arose out of and in the course of his employment; that by reason of his work in the sand pit he "was subjected to a materially greater danger of sunstroke than the ordinary person or outdoor worker."

In *McManaman's Case*, 224 Mass. 554, it was held that a longshoreman, whose hands were frozen while working on a pier extending into the harbor, — where the cold is greater than that to which a person working in the open is ordinarily exposed, — could recover under the workmen's compensation act; but it was found as a fact in the case that the employee was not at liberty to stop his work to prevent his hands from freezing, as a person ordinarily would have been at liberty to do. In the case at bar there is no finding that the employee was required to remain at work if the heat was too severe; and the foreman testified that the men were told "if it became too hot there that they could quit."

The evidence to support the finding that the heat in the gravel pit was any greater than the heat to which an ordinary outdoor worker is exposed, is very slight. There is, however, some evidence to that effect. But because there is nothing to show that the claimant was required to remain in the pit and could not leave the work if he felt he was affected by the heat, the case

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must be recommitted to the Industrial Accident Board. It may be that because of the excessive heat he was suddenly overcome and had no opportunity to escape, — but there is no finding on this point.

The decree is reversed, and the case is to be recommitted to the Industrial Accident Board to hear the parties on the question whether the employee was at liberty to stop his work in time to protect himself from injury. At this hearing both parties may introduce further evidence.

So ordered.

HIRAM H. McGLAUFLIN *vs.* BOSTON AND MAINE RAILROAD.
TERESA DEDDLING *vs.* SAME.
HENRY MARTELL *vs.* SAME.
MARY McSWEENEY *vs.* SAME.
ALICE THOMPSON *vs.* SAME.
MARTHA THOMPSON *vs.* SAME.
WALTER TATE *vs.* SAME.

Middlesex. March 22, 1918. — May 27, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Negligence, Railroad, At grade crossing. *Grade Crossing. Motor Vehicle. Evidence*, Presumptions and burden of proof.

The fact that a railroad corporation, without being ordered so to do by the railroad commissioners or the public service commission under St. 1906, c. 463, Part II, § 151, voluntarily assumed the duty of maintaining a bell operated by an electrical appliance to warn the public against the danger of cars and engines approaching a grade crossing of the railroad with a highway, does not warrant an inference that it also assumed the duty of so warning the public against the danger of collision with a car standing still on the track at the crossing at night, or that the mechanism was intended for that purpose.

In actions by the driver of and a passenger for hire in a motor car which in the night time collided with a car of a train so standing across a highway, where it appeared that the electric bell was not ringing to warn the plaintiffs as they approached and that the time that the train had been so standing was not more than five minutes, there is no evidence of negligence of the defendant.

SEVEN ACTIONS OF TORT for personal injuries caused on July 27, 1915, at 8:20 o'clock in the evening, when a motor car, driven by

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the plaintiff McGlauflin and in which the other plaintiffs were passengers for hire, ran into a freight car which was a part of a railroad train being operated by the defendant and at the time standing still across a grade crossing of the railroad with the highway between Hudson and Marlborough. Writ in the first named action dated September 18, 1915, and in all the other actions dated August 18, 1915.

In the Superior Court the actions were tried together before *Lawton*, J. The material evidence is described in the opinion. At the close of the evidence, the plaintiff McGlauflin excepted to a refusal of the judge to grant certain requests for rulings. He also excepted to certain portions of the charge. These exceptions, as stated in the opinion, owing to the decision of this court have become immaterial. The judge refused to grant a motion of the defendant that a verdict be ordered in its favor in each action.

The judge submitted to the jury the following special questions, the first of which was answered in the affirmative, and the second in the negative:

"Was the electric bell at the crossing silent from the time the automobile came within hearing distance of the crossing until the time of the accident?

"Had the defendant's train been on the crossing for more than five minutes before the accident happened?"

The jury found for the defendant in the action by McGlauflin, for the plaintiff Tate in the sum of $1,000, and for each of the other plaintiffs in the sum of $400.

The presiding judge reported the actions for determination of the plaintiff's exceptions in the McGlauflin case, and upon an agreement of the parties in all of the other cases that, in case this court should determine either that the evidence of the failure of the electric bell, described in the opinion, to ring did not tend to show negligence of the defendant nor of its agents or servants, or that a verdict should have been ordered as asked for by the defendant, then judgment should be entered in each case for the defendant; and, if such ruling as to evidence should have been made and if the cases should have been submitted to the jury on the issue of negligence of the defendant because of the failure of the electric bell to ring, then judgment on the verdict was to be entered for the plaintiffs.

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St. 1906, c. 463, Part II, §§ 151, 155, are as follows:

"Section 151. The board of railroad commissioners, after notice to a railroad corporation whose railroad crosses a highway, town way or travelled place at the same level, and a hearing, may direct in writing that gates shall be erected at said crossing across said way or place and that an agent be stationed thereat to open and close such gates when an engine or train passes, or that a flagman be stationed at the crossing, who shall display a flag when an engine or train passes, or that such crossing shall be provided with such an electric signal as said board determines the better security of human life or the convenience of the public travel requires, and the corporation shall comply with such order.

"Section 155. A railroad corporation, or receiver, or assignee thereof, or its or his servant or agent, shall not wilfully or negligently obstruct or unnecessarily or unreasonably use or occupy a highway, town way or street, or in any case obstruct, use or occupy it with cars or engines for more than five minutes at one time; and if a highway, town way or street, has been thus used or occupied with cars or engines, the railroad corporation, or receiver or assignee thereof, shall not again use or occupy it with the cars or engines of a freight train, until a sufficient time, not less than three minutes, has been allowed for the passage across the railroad of such travellers as were ready and waiting to cross when the former occupation ceased. A railroad corporation, receiver, or assignee thereof, who violates the provisions of this section, shall forfeit one hundred dollars."

W. J. Patron, (*J. J. Shaughnessy* with him,) for the plaintiffs.

J. M. O'Donoghue, (*F. N. Wier* with him,) for the defendant.

CARROLL, J. The plaintiff McGlauflin was operating for hire an automobile, between Hudson and Marlborough, for the conveyance of passengers. The other plaintiffs boarded the automobile about eight o'clock in the evening, July 27, 1915, at Hudson, to be carried to Marlborough. About a mile from the starting place the public highway crosses the defendant's railroad at grade. The railroad crossing cannot be seen by a person travelling in the direction in which the plaintiffs were going until within about two hundred and fifty to three hundred feet of it. There was an electric bell at the right of the highway, designed to warn travellers on the highway of approaching trains, which was installed

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and maintained by the defendant, although not required by an order under St. 1906, c. 463, Part II, § 151. While the plaintiffs were travelling at the rate of eighteen miles an hour, they came into collision with a freight train standing on the crossing, and received the injuries of which they complained. They testified that they listened for the bell and did not hear it. McGlauflin testified that he was about fifty feet away when he first saw the train and it was impossible for him to stop his machine in less than sixty feet. One headlight on the automobile was not lighted and the other threw its rays about forty feet. There was evidence that the failure of the gong to ring was caused either by an exhausted battery or by broken connections.

The jury found that the bell was silent from the time the plaintiffs came within hearing until the time of the collision, and that the train had not been on the crossing for more than five minutes before the accident occurred. St. 1906, c. 463, Part II, § 155. They found for the defendant against the plaintiff McGlauflin, and his case is before us on exceptions, with a stipulation that if the evidence of the failure to ring the bell did not show negligence of the defendant or its servants, and if the case should not have been submitted to the jury on this issue of negligence, then judgment is to be entered for the defendant; they also found for the other plaintiffs, and the judge reported the cases to this court.

The only negligence relied on is the failure of the electric gong to ring. Even if this appliance were maintained by the defendant because required to do so under the authority of the statute, its purpose was to protect travellers on the highway from the danger of approaching trains, and not to warn the public against cars and engines which were standing still. A plaintiff cannot recover for the violation of a statute unless there is a causal connection between his injury and the condition to which the statute applies. *Berdos* v. *Tremont & Suffolk Mills*, 209 Mass. 489, 497. See also *Wylie* v. *Blake & Knowles Steam Pump Works*, 221 Mass. 489, 493, 494; *Davis* v. *John L. Whiting & Sons Co.* 201 Mass. 91, 96. See, in this connection, *White* v. *New York, New Haven, & Hartford Railroad*, 200 Mass. 441, where it was decided that the statute relating to signals at a grade crossing did not apply when a portion of a train had passed the crossing and stopped, leaving the rear car on the crossing. In *Trask* v. *Boston & Maine Railroad*,

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219 Mass. 410, it was held that a traveller on a highway in an automobile colliding with a car at rest upon a public crossing, could not recover.

The train was east bound. There was evidence that, when a train was approaching the crossing, the mechanism was so arranged that fifteen hundred feet west of the highway the bell would begin to ring and would continue to ring until the last car of the train had reached a point thirty feet west of the highway. Even if the gong did not sound when the plaintiffs drew near the crossing, and it was customary for it to ring when trains were passing, this would not be a violation of the statute. The plaintiffs could not rely on this circumstance to establish the defendant's negligence, although it might have bearing upon the question of the plaintiffs' care.

The fact that the defendant maintained this electric appliance to warn the public against the danger of approaching cars and engines, and voluntarily assumed the duty without an order or request from the railroad commissioners, does not show that the arrangement was intended to protect travellers against the danger of collision with a car standing on the track, or that the mechanism was operated for such a purpose. A failure to use a safety appliance, adopted as a protection against some particular danger, cannot be relied upon to prove negligence when the injury is caused by another danger which the appliance was not designed to guard against; and the responsibility voluntarily assumed to maintain these signals imposes no higher duty upon a railroad company than the statute requires. There is nothing in *Cross* v. *Boston & Maine Railroad*, 223 Mass. 144, 148, 149, inconsistent with what is here decided. As the cause of the injury was not the failure of the gong to sound as the train approached the crossing but the collision with a train of cars standing still, and as the electric appliance was not intended to notify them of such a condition, the plaintiffs cannot recover.

According to the report and stipulation, as the failure of the electric bell to ring did not tend to show negligence causing the injury, judgment is to be entered for the defendant. It is therefore unnecessary to consider the exceptions in the McGlauflin case.

Judgment for the defendant in each case.

So ordered.

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HELEN A. CONNORS *vs.* ANNIE L. RICHARDS.

Suffolk. March 25, 1918. — May 27, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Negligence, Of one owning or controlling real estate. *Evidence*, Presumptions and burden of proof. *Release*. *Contract*, In writing, Construction. *Agency*, Existence of relation, Scope of employment.

At the trial of an action by a woman against the owner of a building in a city for personal injuries alleged to have been received when a piece of ice fell from the building upon the plaintiff, the plaintiff testified in direct examination that the ice fell from the building. Later she testified that it fell from the roof and was about a foot long and from four to five inches wide and from four to five inches thick. On cross-examination she testified that she did not know where the ice came from. *Held*, that it was for the jury to choose between these contradictory statements, and that a finding was warranted that the ice fell from the roof of the defendant's building.

In the foregoing action it was admitted that, although parts of the defendant's building were rented to tenants, the roof was under the defendant's care and control, and it was *held* that, if the jury found that ice of the size described by the plaintiff came from the roof and struck the plaintiff, they would be warranted in finding for the plaintiff.

At the trial of an action for personal injuries from being struck on the head by a piece of ice falling from a building of the defendant, there was evidence that the same piece of ice damaged the plaintiff's muff, that the superintendent of the building sent the plaintiff with the janitor to a lawyer's office, where the plaintiff first was offered $2 "for the damage done her muff;" that after further talk $5 was paid, that before receiving this amount a release of all demands was drawn up in duplicate by a young woman in the office who, when she presented it to the plaintiff for her signature, said it was a "receipt for $5 for damage to her muff," and that the plaintiff, relying on that representation, signed the release. The defendant produced both duplicate originals of the release and relied upon them. *Held*, that the jury were warranted in finding that the representations as to the releases were made and that they were binding upon the defendant; and that the release therefore did not bar the action.

TORT for personal injuries caused by being struck upon the head by a piece of ice falling from a building of the defendant on State Street in Boston. Writ dated May 2, 1916.

In the Superior Court the action was tried before *Hall*, J. The statement in the record as to the second release, mentioned in the opinion, was as follows: "The defendant called the plain-

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tiff as a witness and showed her another release, which the plaintiff testified bore her signature, but did not remember signing. It bore the same date and wording as the first release signed by the plaintiff, and it was agreed by the parties that this second release was a carbon duplicate of the first release and was signed at the same time the first release was signed."

Other material evidence is described in the opinion. At the close of the evidence the defendant moved that a verdict be ordered for her. The motion was denied. The defendant then asked for the following rulings:

"1. There is no sufficient evidence of the negligence of the defendant or the defendant's agents or servants and therefore the plaintiff is not entitled to recover.

"2. If the jury find that the top floor of the building number 114 State Street was at the time of the plaintiff's accident let wholly to one tenant, then the plaintiff is not entitled to recover.

"3. It is wholly conjectural from what part of the defendant's building the ice fell which the plaintiff claims injured her and therefore she is not entitled to recover.

"4. There is no evidence to vitiate the release signed by the plaintiff and therefore she cannot recover.

"5. If the evidence is sufficient to vitiate the release first offered in evidence, there is nothing to break the force and effect of the second release introduced in evidence and therefore the plaintiff cannot recover.

"6. If the jury find that the plaintiff received no substantial physical injury and that such injuries as she may have sustained were the result of fright merely, she is not entitled to recover.

"7. There is no evidence that what was said by the stenographer to the plaintiff to show that said stenographer in saying what she did say was acting within the scope of her employment."

The rulings were refused.

The jury found for the plaintiff in the sum of $700, and the judge reported the case to this court, judgment to be entered on the verdict if his rulings were correct; otherwise, judgment to be entered for the defendant.

C. S. Knowles, for the defendant.

J. T. Cassidy & P. Mansfield, for the plaintiff, submitted a brief.

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CARROLL, J. The plaintiff was injured by ice falling from the defendant's building. Parts of the building were rented to tenants, but the defendant admitted that the gutters and the roof were in her charge and control. The statutory notice was seasonably given, and there was evidence that the plaintiff was in the exercise of due care. She testified, in substance, that the ice struck her on the head and "bounding, struck her muff and cut a tail off it;" that the superintendent of the building sent her with the janitor to a lawyer's office where she signed a receipt executed in duplicate, under seal, in full of all demands, the consideration being $5. The jury found for the plaintiff in the sum of $700.

In one part of her direct evidence the plaintiff said the ice fell from the building. Later she testified that it fell from the roof and was about a foot long and four to five inches wide and four to five inches thick. On cross-examination she said she did not know where it came from. It was for the jury to choose between these contradictory statements. *Tierney* v. *Boston Elevated Railway*, 216 Mass. 283. *Kane* v. *Boston Elevated Railway*, 218 Mass. 101. If they believed that a piece of ice of the size described by the plaintiff fell from the roof of the building, it being admitted that the roof was under the defendant's care and control, they could find the defendant was negligent. *Shepard* v. *Creamer*, 160 Mass. 496. *Shipley* v. *Fifty Associates*, 101 Mass. 251. *Brewer* v. *Farnam*, 208 Mass. 448. *Green* v. *Carigianis*, 217 Mass. 1. *Yorra* v. *Lynch*, 226 Mass. 153.

The defendant contends that it was entirely conjectural from what part of the building the ice fell, — that it may have fallen from the portion of the building controlled by the various tenants. That would be true were it not for the direct testimony of the plaintiff that the ice fell from the roof; and it was for the jury to say how far they relied on this statement.

According to the plaintiff's testimony, which on the record does not appear to have been contradicted, the first offer made her was $2 "for the damage done her muff," but after some further talk $5 was paid; before receiving this amount the release was drawn up by a young woman in the office who, when she presented it to the plaintiff for her signature, said it was a "receipt for $5 for damage to her muff," and the plaintiff relying on this representation signed the release. It is not in evidence

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that at this time any claim was made for damages on account of personal injury; and the conversation concerned the personal property damage only. These facts bring the case within the rule stated in *Bliss* v. *New York Central & Hudson River Railroad*, 160 Mass. 447, 454. It was for the jury to say whether the plaintiff signed the writing relying on the misrepresentation that it was a receipt merely for the damage to her property, and if they so found they could find that she was not deprived of her right to recover for injuries to her person. *Freedley* v. *French*, 154 Mass. 339. *Larsson* v. *Metropolitan Stock Exchange*, 200 Mass. 367. From all the evidence disclosed by the record, the representations as to the contents of the release were binding upon the defendant. Both of the duplicate originals of the release were part of the same transaction and the same representations applied equally to each of them.

In accordance with the report, judgment is to be entered for the plaintiff for the amount of the verdict, with interest from June 22, 1917, and costs.

So ordered.

DANIEL J. SAWYER *vs.* ARNOLD AND WINSOR COMPANY.

Middlesex. March 26, 1918. — May 27, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Negligence, Of dealer toward customer.

If one going to buy fish from a wholesale dealer on a fish pier is locked in the fish dealer's refrigerator through the negligence of one of the dealer's servants acting within the scope of his authority and thereby suffers injury, he has a cause of action against the fish dealer.

TORT by a retail fish dealer against a corporation, carrying on the business of a wholesale fish dealer at the fish pier in the part of Boston called South Boston, for personal injuries sustained on October 8, 1914, by being locked in a refrigerator through the negligence of the defendant's servants and kept there for some time. The declaration also contained a second count alleging that the "servants and agents of the defendant, intending to

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play a practical joke on the plaintiff, locked him in a refrigerator or room to preserve goods, whereby the plaintiff was injured." Writ dated November 12, 1914.

In the Superior Court the case was tried before *Keating*, J. The evidence is described in the opinion. At the close of the evidence the defendant filed a motion asking the judge to order a verdict for it. The judge refused to order a verdict for the defendant and submitted the case to the jury, a portion of his charge being as follows: "So it becomes necessary for you to determine, if you find that the occurrence took place in the way in which the plaintiff says it did, whether the employee of the defendant in locking that door after he went out of the refrigerator, if he did lock it, was playing a practical joke on this plaintiff, or whether he was doing something in the way of performing the work for which he was hired. You have heard the evidence in the case. If you come to the conclusion that the occurrence took place as the plaintiff testified, but that an employee of the defendant was playing a practical joke upon the plaintiff, that when he closed the door on him he intended to have fun with him, then the plaintiff cannot recover, because in doing that act for such a purpose he would not be acting within the scope of his employment. But if you should find that the occurrence took place as the plaintiff says and that the employee in closing or locking the door on the plaintiff, if he did close it or lock it, was doing so for the purpose of performing the work for which he was hired by the defendant, then he would be acting within the scope of his employment. Now, if you find that he was not acting within the scope of his employment, the plaintiff cannot recover. If you find that the employee of the defendant was acting within the scope of his employment, then you come to the consideration of the question, Was he negligent? Did he exercise such care as an ordinary prudent man would be likely to use under such circumstances? What was the employee doing? What knowledge did he have of the circumstances existing at that time? What knowledge did he have of the presence of the plaintiff?"

The jury returned a verdict for the plaintiff in the sum of $350; and the defendant alleged exceptions.

C. S. Knowles, for the defendant.

J. J. Foley, for the plaintiff.

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CARROLL, J. The plaintiff testified that he went to the defendant's place of business at the fish pier, South Boston, to purchase some fish; that he was shown to the refrigerator by a servant of the defendant; that the door was shut and he was kept therein from fifteen to twenty minutes. This evidence was disputed. The declaration was in two counts, — the first alleging negligence of the defendant in locking the door and keeping the plaintiff in the refrigerator; the second, that the servants or agents of the defendant, intending to play a "practical joke on the plaintiff," locked him in the refrigerator. The judge instructed the jury that the plaintiff could not recover if the employees intended to play a joke on him, or shut the door "to have fun with him," or if he himself closed the door and the defendant's employees had no knowledge that he was shut in; and fully instructed them that the plaintiff could not recover unless the defendant's employees, acting within the scope of their employment, negligently shut the door and suffered him to remain in the refrigerator.

The jury found for the plaintiff. Therefore, under the judge's instructions, they must have found that the plaintiff was a customer of the defendant, properly upon the premises, and was injured by reason of the negligence of one of its agents while acting within the scope of his authority. Under such circumstances the plaintiff clearly was entitled to recover.

Exceptions overruled.

WILLIAM B. ARNOLD *vs.* GEORGE H. MAXWELL & another.

Suffolk. March 8, 1918. — May 29, 1918.

Present: RUGG, C. J., BRALEY, CROSBY, & CARROLL, JJ.

Equity Pleading and Practice, Master's report. *Rules of Court. Evidence*, Of value. *Interest. Equity Jurisdiction*, For an accounting. *Damages*, In equity. *Law of the Case.*

An objection at a hearing before a master in a suit in equity to the admission of certain evidence cannot be made the foundation of an exception to the master's report on the ground of his admission of the evidence, if the party attempting thus to except to the master's report failed to file an objection in writing as required

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by Equity Rule 31 after notice of the preparation of the master's draft of his report.

Where a suit in equity for an accounting was referred to a master to ascertain the value of the stock of a certain corporation at a certain date, the master against objection, for the purpose of showing the value of the stock at that date, admitted evidence showing the earnings of that corporation for the three years succeeding the date in question and ruled "that he was entitled to consider all the facts reported to him, considering subsequent events so far and so far only as they serve to indicate the true worth of elements of value actually existing on" the day in question. No objection in writing to the master's report on account of the admission of this evidence was filed as required by Equity Rule 31, so that an exception to the master's report on this ground could not be considered, but it was *said* that the objecting party was not harmed by the ruling of the master.

Although the general rule in equity as at law is to allow only simple interest by way of damages, yet compound interest sometimes is allowed, and in the present case, where the defendant had been ordered to account for the value of certain stock at a certain date and the case was referred to a master to ascertain the value of the stock at that date, it was *held* that a ruling of the master was not erroneous, that interest should be computed "from the date of settlement to the date of the filing of the bill, with a rest as of the date of filing the bill and interest thereafter on the principal so ascertained" to the date of the decree.

In the case above described a decision of this court at a previous stage of the same case had ordered that, in the accounting, interest should be allowed on the whole amount due to the plaintiff "from the date of settlement to the date of filing the bill," and it was *pointed out* that this was the law of the case.

BILL IN EQUITY, filed in the Supreme Judicial Court on January 20, 1912, in substance for an accounting between partners.

The case first was reserved by *Braley*, J., for determination by the full court, and, by a decision reported in 223 Mass. 47, it was decided that the defendant was chargeable in a partnership accounting on the basis of an agreement of equality as of January 20, 1908, the date of a settlement that had been made between the partners, both for certain payments made to the defendant for legal services and for the value of certain additional shares in the stock of the North American Chemical Company, called the Spalding stock, that had been acquired secretly by the defendant, and it was ordered that the case be recommitted to the master, the terms of the decree to be settled before a single justice.

Thereafter by an order made by a single justice the case was recommitted to the master "to ascertain the value of the Spalding stock as of January 20, 1908, the date of the settlement between the defendant Maxwell and the plaintiff."

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The master filed a report, to which both the plaintiff and the defendant filed exceptions. Later the case was heard by *De Courcy*, J., upon the exceptions to the master's report. The material portions of the master's report and the defendant's exceptions to that report are stated in the opinion. The single justice was of the opinion that the exceptions to the master's report taken by the plaintiff should be overruled and that the exception taken by the defendant should be sustained, and he so ruled. He found that the number of the Spalding shares, the value of which the plaintiff was entitled to recover, was two hundred and twelve; that the amount of dividends received on that number of shares, and to which the plaintiff was entitled, was $7,691.33; that the amount of the payments for legal services to which the plaintiff was entitled was $830; and that the payment on account of treasury stock made by the defendant to the company, with which the defendant was to be credited, was $975. The single justice reported the case for determination by the full court of the correctness of his rulings as to the exceptions and the question as to what value should be placed upon the Spalding stock as of January 20, 1908, upon the master's report. He further reported the question whether the interest to which the plaintiff was entitled under the decision in 223 Mass. 47, 54, was to be computed from the date of settlement to the date of the decree, or from the date of the settlement to the date of filing the bill, with a rest as of the date of filing of the bill and interest thereafter on the principal so ascertained, a decree for the plaintiff to be entered for the amount as determined upon the master's report and the facts here stated.

J. B. Studley, for the plaintiff.

S. L. Whipple, (*A. Lincoln* with him,) for the defendants.

CARROLL, J. In the former decision in *Arnold* v. *Maxwell* (223 Mass. 47), the case was recommitted to the master, who by an interlocutory decree was directed "to ascertain the value of the Spalding stock as of January 20, 1908." The master admitted evidence of the earnings of the North American Chemical Company for three years succeeding January 20, 1908, (to which ruling the defendant objected) and found that the value of the stock in this company at that time was $125 a share. The defendant excepted, "because the master found and ruled . . . that the value of the stock of the North American Chemical Company as of

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January 20, 1908, was $125 a share, following the theory that he was entitled to consider all the facts reported to him, considering subsequent events so far and so far only as they serve to indicate the true worth of elements of value actually existing on January 20, 1908." No written objection to the report was delivered to the master, as required by Equity Rule 31.

The single justice by whom the case was heard was of opinion that the defendant's exception should be sustained, and reported for the determination of the full court his ruling on this question and also the question whether interest was to be computed "from the date of settlement to the date of the decree, or from the date of the settlement to the date of filing the bill, with a rest as of the date of filing the bill and interest thereafter on the principal so ascertained."

The defendant's exception is not before us. He objected when the evidence was admitted showing the earnings of the corporation for the three years succeeding January 20, 1908, but failed to comply with Equity Rule 31, requiring the filing of a written objection with the master. The objection taken by the defendant cannot be relied on to maintain an exception to a master's report without an objection in writing to the report itself. *Hillier* v. *Farrell*, 185 Mass. 434. *Smedley* v. *Johnson*, 196 Mass. 316. *Murphy* v. *Moore*, 228 Mass. 565.

It may not be improper to say that we do not think the defendant was harmed by the ruling of the master. He was directed to find the value of certain shares of stock in a partnership accounting, "on the basis of the agreement of equality." The stock had no market value as fixed by actual sales and it was not quoted on any exchange. Even if a market might be created for it, the price which a third person not connected with the enterprise would pay was not a fair measure of the value of the stock which the defendant should be called upon to pay his partner; nor was the true value in an accounting between partners what the stock was worth to the defendant, without considering its importance to him as a means of controlling the corporation management. In determining the value of the stock at $125 per share, the master found what it was worth to the defendant who sought the direction and control of a successful business and it was proper to take into account all the elements which made the stock valuable to him for

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any purpose. *Hutchins* v. *Page*, 204 Mass. 284. The net earnings of the corporation for the two years preceding January 20, 1908, were $36 a share. The defendant successfully continued the business and for three years following January, 1908, carried it on in substantially the same way as before. The net earnings of the corporation for that period were $31 per share. We find no error in considering these subsequent earnings for the purpose of ascertaining the value of the stock in January, 1908, especially when the corporation was controlled by the same person and engaged in the same undertaking, which was a substantial continuation of the business as it existed in January, 1908. Under these conditions, in an equitable accounting between partners the subsequent events could be considered in ascertaining the value of the stock to the defendant as of the earlier date. Subsequent sales of land similarly situated to the petitioner's land, are frequently admitted, and "the mere lapse of time after the taking did not render the evidence of the sales incompetent." *Roberts* v. *Boston*, 149 Mass. 346, 354. Where stock has no market value when issued, evidence of succeeding sales may be resorted to. *East Tennessee Land Co.* v. *Leeson*, 183 Mass. 37, 40, 41. In *Whiting* v. *Price*, 172 Mass. 240, 242, the jury were instructed to consider "what has happened since in order to determine what the value of the bond was and what it is now." This instruction was held to be correct.

The general rule in equity and law is to allow simple interest by way of damages, and following this rule the defendant contends that interest should be computed from the date of the settlement to the date of the decree. *Parker* v. *Simpson*, 180 Mass. 334, 359. *McKim* v. *Blake*, 139 Mass. 593. But this general rule is not always followed. Compound interest sometimes is allowed to prevent a fiduciary who has acted dishonestly from acquiring unjust profit or gain and for the purpose of affording a just and equitable settlement. *Boynton* v. *Dyer*, 18 Pick. 1, 6, 7. *Jennison* v. *Hapgood*, 10 Pick. 77, 104, 105. *Forbes* v. *Ware*, 172 Mass. 306, 310. It was accordingly held in *Arnold* v. *Maxwell*, 223 Mass. 47, that the plaintiff was entitled to interest on the whole amount due him from the time of settlement to the date of filing the bill. This is the law of the case, see *John Hetherington & Sons, Ltd.* v. *William Firth Co.* 212 Mass. 257, 260; *Taylor* v. *Pierce Brothers, Ltd.*

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220 Mass. 254, 255, and must decide the question of the computation of interest.

It follows that interest is to be computed on the amount due the plaintiff from the date of settlement to the date of filing the bill, with a rest as of that date, and interest thereafter to the date of the decree. The report of the master is affirmed. A decree is to be entered in favor of the plaintiff for the amount determined in the master's report and the facts stated in the report of the single justice, with interest from the date of settlement to the date of filing the bill, and interest on that amount to the date of the decree.

So ordered.

CATHERINE KENNEALLY, administratrix, *vs.* OCEANIC STEAM NAVIGATION COMPANY, LIMITED.

Suffolk. March 12, 1918. — May 29, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Negligence, Employer's liability, Toward longshoreman. *Ship.*

A steamship had been unloaded by means of a stage of planking extending from the pier about thirty or thirty-five feet long and six feet wide with guard rails of timber on each side, the top of each rail being five or six inches above the floor of the stage. While the vessel was being unloaded platforms were placed against the side of the stage to prevent the cargo from falling into the water and were removed as soon as the cargo was unloaded. While these platforms were in place the longshoreman who each time threw back the fall to lower the next piece of cargo stood with one or both feet on the platform. An experienced longshoreman in the employ of the owner of the vessel, who had been working in this way, temporarily left his work to go to another part of the pier and when he returned the hatch he was working at had been emptied of cargo and the dirt that had been swept out of the hold was being lowered in boxes. The longshoreman, with a fellow workman, was ordered to attend to this work. During his absence, when the unloading was completed, the platforms by the side of the stage had been removed by order of the superintendent. It was broad daylight at three o'clock in the afternoon. When the last box of dirt was lowered the longshoreman threw the fall back to the hatchman. As he threw the fall he was standing on the rail of the stage and, either because he lost his balance or because he stepped back where the platform had been, he fell between the vessel and the pier and received severe injuries which resulted in his death. In an action by the administratrix of the estate of the longshoreman against the owner of the vessel to recover for his death and conscious suffering, it was *held*, that there

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was nothing to show negligence on the part of the superintendent, who had no reason to think that the longshoreman expected to use the platform to stand upon when it was apparent that it had been removed, and that, even if it had been the custom not to remove the platforms until the cleaning of the hold had been completed, it was not the duty of the superintendent to warn an experienced longshoreman of a danger which was plainly visible.

In the same case it was *held* that the platforms were not a part of the ways, works or machinery of the defendant.

TORT by the administratrix of the estate of Daniel J. Kenneally, late of Boston, to recover for the death and conscious suffering of the plaintiff's intestate on September 27, 1911, when he was employed by the defendant as a longshoreman, the declaration containing two counts, the first alleging negligence of a superintendent and the second alleging a defective condition of the ways, works or machinery of the defendant. Writ dated May 14, 1912.

In the Superior Court the case was tried before *Sanderson*, J. The evidence is described in the opinion. At the close of the evidence the judge ruled that the action could not be maintained and ordered a verdict for the defendant. The plaintiff alleged exceptions.

J. Cavanagh, for the plaintiff.

S. R. Jones, for the defendant.

CARROLL, J. The plaintiff's intestate, Daniel J. Kenneally, was employed by the defendant as a longshoreman. On September 27, 1911, he was at work discharging a cargo from No. 4 hatch of the steamship Canopic; seventeen men were engaged in this work, nine in the hatch, and eight on the trucks which were used to remove the cargo from the wharf. In handling the trucks the men worked in pairs. The material was lowered by a fall over the ship's side, one of the men unhooking the load, the other handling the truck. The stage on which the cargo was landed extended from the wharf to the ship; it was of planking firmly fastened together, about thirty or thirty-five feet long and six feet wide, with guard rails of timber on both sides, the top of each rail being five or six inches above the floor of the stage. Platforms or skids from four to six feet wide were placed against the side of the stage, and there was evidence that they were so placed to protect the cargo from falling overboard and were removed as soon as the ship was discharged. There was also some evidence that in throwing back the fall a man stood with one or both feet on the platform.

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About half past two o'clock in the afternoon, the No. 4 hatch had been discharged and all the men, except Kenneally and his partner, had been set to work in the hold sweeping the dirt before loading the outward cargo. Kenneally went to another part of the pier and during his absence the platforms were removed by order of the superintendent. The intestate and his partner were ordered to get two boxes of sawdust for use in the hold, and to take away the boxes of dirt as they were lowered to the stage, — these boxes being lowered in the same manner as the cargo. Two of the boxes had been lowered and carried away, and as the third box was lowered and placed on the truck, Kenneally, standing on the rail of the stage, threw the fall to the hatchman; and either because he lost his balance or stepped back where the platform had been, he fell, receiving injuries from which he died. The ship listed slightly inshore, making it more difficult to throw the fall. The accident happened about three o'clock in the afternoon, there was plenty of light at the time. The action is under the employers' liability act, the plaintiff contending there was negligence of the superintendent. The judge directed a verdict for the defendant.

When the employee returned to the stage it was perfectly obvious that the platforms had been removed. There was nothing to show negligence on the part of the superintendent: he did not know that Kenneally expected to use the platform to stand upon when it was apparent it had been removed; and, even if it were not customary to remove the platforms until the hold had been cleaned, there was no duty on the part of the superintendent to warn an experienced longshoreman of a danger which was visible on the slightest inspection. *Lenzi* v. *Hanscom Construction Co.* 221 Mass. 195. *Cole* v. *L. D. Willcutt & Sons Co.* 218 Mass. 71. *Kempton* v. *Boston Elevated Railway*, 217 Mass. 124.

The skids or platforms were not a part of the ways, works or machinery of the defendant. *Cuozzo* v. *Clyde Steamship Co.* 223 Mass. 521. *Neagle* v. *New York, New Haven, & Hartford Railroad*, 214 Mass. 472.

Exceptions overruled.

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MICHAEL WINSTON vs. CONVERSE RUBBER SHOE COMPANY.

Middlesex. March 26, 1918. — May 29, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Negligence, Employer's liability. *Evidence*, Opinion: experts.

In an action by a workman for personal injuries sustained, before the workmen's compensation act took effect, when the plaintiff was in the employ of the defendant and with other employees of the defendant was engaged in moving a hot water heater over a concrete floor in the defendant's factory, by reason of one of the legs of the heater coming out from the groove in which it was fitted, and causing the heater to fall on the plaintiff, it appeared that the heater was five feet in height and about two feet in diameter and weighed about nine hundred pounds, that it was supported on three iron legs twelve or fifteen inches high, which were attached to the heater by fitting into grooves on its under side in the manner that legs ordinarily are attached to a kitchen stove, that the plaintiff never had had any experience in moving heaters or stoves, that he came to this country from Ireland and went to work for the defendant the month after that of his arrival, that at his home in his native country there were no stoves, fireplaces being used for heating, that before the accident he never had seen the legs of a heater and did not know how they were fastened. He testified that they "appeared to be all one casting." Another employee of the defendant testified that it appeared to him as if the legs of the heater were all one casting and that he did not discover that the legs were attached by grooves until after the accident. *Held*, that upon this evidence it could not have been ruled as matter of law that the danger connected with the work was so obvious that the plaintiff assumed the risk of injury and that, whether he was in the exercise of due care and whether he assumed the risk, were questions of fact for the jury.

In the case above described a man of experience in handling heaters, called by the plaintiff as a witness, testified as an expert, subject to the defendant's exception, that the method adopted in moving the heater was improper, and that a proper method would have been to remove the legs first and then by means of rollers and skids to slide or roll the heater along the floor. *Held*, that it could not be said that the proper way to do the work was so familiar to men of ordinary intelligence and understanding that expert testimony would not be instructive, and that the evidence was competent.

In the same case it also was *held* that on the evidence above described the question, whether the defendant was negligent in the method adopted in doing the work and in failing to warn the plaintiff of the serious consequences that might follow if the legs suddenly were pulled away from the heater or slipped out of the grooves, was one of fact for the jury.

TORT by a workman for personal injuries sustained in the defendant's employ between ten and eleven o'clock on the morning

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of Sunday, August 6, 1911, by the falling over on the plaintiff of a hot water heater, which is described in the opinion, when it was being moved a distance of ten or twelve feet over a concrete floor in the boiler room of the defendant's factory at Malden. Writ dated September 15, 1911.

In the Superior Court the case was tried before *Lawton*, J. At the trial the plaintiff elected to rely on the fourth count of his declaration, which was at common law as follows: "And the plaintiff says that on or about August 6, 1911, he was employed by the defendant in its factory at Malden in the county of Middlesex; that while so employed, and in the exercise of due care, he received personal injuries through the negligence and carelessness of the defendant and its agents and servants, and was permanently and incurably disabled." There was another paragraph which related solely to the extent of the plaintiff's injuries.

The plaintiff's evidence is described in the opinion. At the end of the plaintiff's evidence the defendant rested and moved that a verdict be ordered for it. The judge denied the motion and submitted the case to the jury, who returned a verdict for the plaintiff in the sum of $1,500, of which the plaintiff afterwards remitted the amount of $500, leaving the verdict in the sum of $1,000. The defendant alleged exceptions.

C. S. Knowles, for the defendant.

J. A. Pagum, for the plaintiff.

CROSBY, J. This is an action to recover for personal injuries received by the plaintiff while in the defendant's employ. He elected to rely on the fourth count of his declaration, which sets forth a cause of action at common law.

The accident occurred while the plaintiff and three other employees of the defendant were moving a hot water heater over a concrete floor in the defendant's factory on August 6, 1911. As the plaintiff was injured before the workmen's compensation act (St. 1911, c. 751) went into effect, its provisions are not applicable.

The heater, which was cylindrical in shape, was set on three iron legs, twelve or fifteen inches high, which were attached to the heater by grooves or sockets on the under side, similar to the manner legs ordinarily are attached to a kitchen stove; it was about two feet in diameter and five feet in height, and weighed about nine hundred pounds. The plaintiff and another workman were

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in front of the heater lifting and pulling it along, and two other workmen on the opposite side lifted and pushed it. While so engaged, one of the legs came out and the heater fell on the plaintiff causing the injuries complained of.

A witness of experience in handling heaters, called by the plaintiff, testified as an expert, subject to the defendant's exception, that the method adopted in moving the heater was improper, that a proper method would have been to remove the legs first, and by means of rollers and skids to slide or roll it along the floor. We cannot say that the proper way to do the work was so familiar to men of ordinary intelligence and understanding that expert testimony would not be instructive. The evidence was competent and the exception taken to its admission must be overruled.

The plaintiff was a laborer, who came from Ireland to this country in April, 1911, and went to work for the defendant the following May. He had been employed round the yard for about a week before the accident. It appeared that he never had any experience in moving heaters or stoves, and that in his home in his native country there were no stoves, but that fireplaces were used. Before the accident he had never seen the legs of a heater and did not know how they were fastened; he testified that they "appeared to be all one casting." A stationary fireman in the defendant's employ also testified that it appeared to him as if the legs of the heater were all one casting and that he did not discover that the legs were attached by grooves or sockets until after the accident. Upon this evidence it could not properly have been ruled that the danger connected with the work was so obvious that the plaintiff assumed the risk of injury. He was an ordinary laborer without experience in the work of moving heaters, and if he did not know the manner in which the legs were attached it could have been found that he had no reason to anticipate they would become unfastened. Whether he was in the exercise of due care and whether he assumed the risk, were questions of fact for the jury. Whether the defendant was negligent in the method adopted in doing the work and in failing to warn the plaintiff of the serious consequences that might follow if the legs were suddenly pulled away from the heater, was also a question of fact for the jury.

The work in which the plaintiff was engaged was different from that of moving an ordinary stove; and the case is not like those

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where the danger is so obvious that no warning is required, as in *Healy* v. *Gilchrist Co.* 205 Mass. 393, and *MacLellan* v. *Boston Elevated Railway*, 221 Mass. 20. The case of *Cunningham* v. *Atlas Tack Co.* 187 Mass. 51, is not an authority in favor of the defendant's contention.

It could not be ruled as matter of law that there was no negligence on the part of the defendant, or that the plaintiff could not recover. *Gettins* v. *Kelley*, 212 Mass. 171. *Sanders* v. *New York Central & Hudson River Railroad*, 212 Mass. 269. *Generous* v. *Hosmer*, 216 Mass. 26. *Maddox* v. *Ballard*, 218 Mass. 55. *Bernabeo* v. *Kaulback*, 226 Mass. 128.

Exceptions overruled.

NEVILLE G. DE B. PRIESTLEY, executor, *vs.* TREASURER AND RECEIVER GENERAL.

Suffolk. March 6, 1918. — May 31, 1918.

Present: RUGG, C. J., DE COURCY, CROSBY, & CARROLL, JJ.

Tax, On legacies and successions. *Trust*. *Partnership*, In real estate trust.

Under St. 1909, c. 490, Part IV, § 1, as amended by St. 1916, c. 268, § 1, which imposes a legacy and succession tax on "all real estate within the Commonwealth, or any interest therein, belonging to persons who are not inhabitants of the Commonwealth, which shall pass by will," shares of a real estate trust, the general scheme of which works a conversion of all the property of the trust into personalty as one fund from the outset, are personal property and are not subject to the tax.

Under the same statute, where the deed of trust creating a real estate trust contained no absolute requirement that the property should be sold and the proceeds distributed among the shareholders, and, although the trustees might transfer the property to a corporation if instructed by the shareholders to organize one, they were authorized to sell the property at the expiration of the trust only in default of action relating thereto by the certificate holders, and where the other provisions of the deed of trust created a partnership among the certificate holders, who for convenience had placed the title in trustees as their managing agents, it was *held*, that there had been no equitable conversion of the real property into personalty and that shares of this trust that belonged to a testator who died domiciled in a foreign country were subject to a legacy and succession tax.

The declaration of trust creating the real estate trust first above described, of which the shares were held to be personal property, contained a provision that the

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"shares hereunder shall be personal property," and, in regard to the partnership real estate trust whose shares were held to be real estate, it was *pointed out* that the deed of trust creating that partnership contained no provision that the shares should be personal property, "whatever the legal effect of such a clause may be." If what is desired in order to carry out the purposes of a real estate trust is an organization with a distinct entity, intermediate between a corporation and a partnership or pure trust and with its own rights and obligations, the Legislature and not the courts must be resorted to. By DE COURCY, J.

PETITION, filed in the Probate Court for the county of Suffolk on November 9, 1917, under St. 1909, c. 490, Part IV, § 21, by the executor of the will of Charles Homans Priestley, late of London, England, who, being domiciled in England, died in France on September 4, 1916, unmarried and without issue, owning certain real and personal property in the county of Suffolk in this Commonwealth, including six hundred shares in the Homans Real Estate Trust, one share in the Boston Real Estate Trust and two and one half shares in the Warren Chambers Trust, which the petition alleged that the Tax Commissioner, in valuing the real estate and any interest therein belonging to the petitioner's intestate in this Commonwealth at the time of his death for the purpose of computing the legacy and succession tax to which such property was subject, had treated as real estate; praying that the court should determine whether the whole or any part of those shares ought to be treated as real estate in this Commonwealth or any interest therein or included in the value of the property on which a legacy and succession tax should be computed.

The judge of the Probate Court made a decree that none of the shares mentioned above ought to be treated as real estate in this Commonwealth or any interest therein belonging to the intestate and that the said shares or any part thereof were not subject to a legacy and succession tax in this Commonwealth. The Treasurer and Receiver General appealed.

On appeal the case was heard by *Braley*, J., who made a final decree affirming the decree of the Probate Court. The Treasurer and Receiver General appealed.

W. H. Hitchcock, Assistant Attorney General, for the respondent.

J. L. Thorndike, (*H. Ware* with him,) for the petitioner.

DE COURCY, J. Charles Homans Priestley died on September 4, 1916, domiciled in England. The petitioner, who is the ancillary executor of his will, has brought this petition to determine whether

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certain shares in trusts of Massachusetts real estate are subject to a legacy and succession tax.

Undoubtedly these shares constitute property within the jurisdiction of the Commonwealth, and would have been taxable to non-residents before the enactment of St. 1912, c. 678. *Peabody* v. *Treasurer & Receiver General*, 215 Mass. 129. That statute, continued by St. 1916, c. 268, § 1, confined the tax in case of non-resident decedents, to "real estate within the Commonwealth, or any interest therein." If the shares owned by this non-resident decedent constitute real estate or an interest therein they are taxable, but not otherwise.

In the recent case of *Dana* v. *Treasurer & Receiver General*, 227 Mass. 562, the question arose whether similar shares in the Amoskeag Manufacturing Company and the Boston Ground Rent Trust were real or personal estate or partly each. The beneficial interest in the trust was divided into transferable shares; the real estate and personal property constituted one trust fund, and it was expressly provided that at the termination of the trust the trustees should liquidate the assets and distribute the same among the shareholders,—but there was no provision authorizing the trustees to divide the real property among them. It was held that the real estate was to be considered as converted into personal estate from the beginning, and that consequently the shares were personal property.

As respects the shares in the Homans Real Estate Trust and the share in the Boston Real Estate Trust, the present case cannot be distinguished in principle from the Dana case. The essential facts are similar, and the general scheme of each of these trusts worked a conversion of all the property of the trust into personalty as one fund from the outset. The deceased testator had no interest in the real estate which would go to his heirs, but an interest in the net proceeds of the trust fund, after the sale of all the property. Indeed the Homans Real Estate Trust Agreement expressly provided that "shares hereunder shall be personal property." We are of opinion that these shares, belonging to the estate of a non-resident, and not constituting any interest in real estate, are not subject to a succession tax.

In the trust agreement of the Warren Chambers Trust, however, there is no such imperative requirement that the property shall be

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sold, and the proceeds distributed among the shareholders. The trustees may transfer the property to a corporation if instructed by the shareholders to organize one; but they are authorized to sell the property at the expiration of the trust only in default of action relative thereto by the shareholders. The agreement contains no provision that the shares shall be personal property as to title, — whatever the legal effect of such a clause may be. See *Peabody* v. *Treasurer & Receiver General*, 215 Mass. 129, 130. That there was no equitable conversion of this real property into personalty at the creation of the trust, or at the death of the testator, is virtually settled by the decision in the Dana case relating to the Duluth and Gladstone Real Estate Trust.

This trust agreement, in our opinion, created a partnership relation among the certificate holders, as distinguished from a pure trust. They are associated together, have a fixed annual meeting, and special meetings upon the written request of the holders of one tenth of the shares; they are empowered to fill any vacancy existing in the number of trustees, and may remove any or all of them and elect others in their place. After the erection of the new building the trustees can incur no debt or liability except such as may be incidental to the management of the property held by them, and then only for an amount not exceeding in the aggregate at any one time $10,000; they are specially authorized to mortgage the premises purchased and the buildings they may erect thereon, for a specified amount, but not for a larger amount; and no sale of the real estate can be made by them unless authorized by vote of the shareholders. In short, the certificate holders are associated together, they control the property, and for convenience have placed the legal title to it in trustees as their managing agents. *Williams* v. *Milton*, 215 Mass. 1.

Under the Massachusetts rule, while partnership real estate is personalty so far as necessary to pay the debts of the firm, it is real property for all other purposes. The decedent, as one of the partners, had a beneficial or equitable interest in the real estate of the Warren Chambers Trust; and however that interest may be defined, it was "real estate within the Commonwealth, or any interest therein," and as such was subject to a succession tax by the express terms of St. 1909, c. 490, Part IV, § 1, as amended by St. 1912, c. 678, and St. 1916, c. 268, § 1. *Kinney* v. *Treasurer & Receiver*

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General, 207 Mass. 368. *Kennedy* v. *Hodges*, 215 Mass. 112. *Peabody* v. *Treasurer & Receiver General*, 215 Mass. 129, 131. *Frost* v. *Thompson*, 219 Mass. 360. See *Hawkridge* v. *Treasurer & Receiver General*, 223 Mass. 134.

It is strongly urged by the petitioner that great practical difficulty will arise by applying to such an association as the Warren Chambers Trust the rule applicable to ordinary partnerships. See *Wilcox* v. *Wilcox*, 13 Allen, 252. But those results legally follow from the partnership form of organization voluntarily adopted by the parties. The court has no power to suspend the operation of the established rules of law applicable to partnership real estate, and the interest of the individual partners therein, where the agreement does not provide for the equitable conversion of the real into personal estate. If what is desired in order to carry out the purposes of a real estate trust is an organization with a distinct entity, intermediate between a corporation and a partnership or pure trust, and with its own rights and obligations, the Legislature and not the courts must be resorted to. Wrightington, on Unincorporated Associations, 78.

The decree of the Probate Court is affirmed so far as it relates to the shares of the Homans Real Estate Trust and the share of the Boston Real Estate Trust. As to the shares of the Warren Chambers Trust the decree is reversed, and a decree is to be entered declaring that so much of these shares as represents an interest in real estate owned by the Warren Chambers Trust is subject to a succession tax under the statute.

Decree accordingly.

HENNEBIQUE CONSTRUCTION COMPANY *vs.* BOSTON COLD STORAGE AND TERMINAL COMPANY.

Suffolk. March 25, 1918. — May 31, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Contract, Building contract, Construction, Performance and breach. *Architect. Estoppel.*

Where a building contract in writing contained a provision that "the final payment shall be made within forty-five days after the completion of the work included in this contract, and all payments shall be due when certificates for the

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same are issued," and also a provision that "no certificate given or payment made under this contract, except the final certificate or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part, and that no payment shall be construed to be an acceptance of defective work or improper materials," a letter of the architect, containing an acceptance of the building upon condition that the contractor is to remedy certain defects of workmanship or of materials, is not of itself a final certificate which can be treated as conclusive evidence of performance, although the contractor promptly performs the conditions named in the architect's letter.

The certificate required by the provisions above quoted must be complete and must contain a statement in writing authenticated by the signature of the architect that the final payment, naming the amount, is payable to the contractor under the terms of the contract.

In an action upon the contract above described, where the architect wrote a letter to the contractor accepting the building upon condition that certain defects of workmanship and of materials should be remedied, and these were remedied, and it appeared that the architect's letter, before being sent to the contractor, had the approval in writing of the owner, it was stated that the questions *whether*, under all the circumstances, the letter operated as a waiver of the right of the owner to insist upon the architect's final certificate, and, if it did so operate, *whether* the owner thereby was precluded from claiming in recoupment damages for defective workmanship or materials, were not raised by the record.

CONTRACT for a balance alleged to be due for the construction of a concrete building. Writ dated May 4, 1912.

The declaration was in five counts, setting forth claims under a building contract and on a *quantum meruit*. The answer contained a general denial, set forth a claim of recoupment and alleged that as a prerequisite to recovery the plaintiff was required by the contract to procure a final certificate of the architect, which had not been procured.

The action was referred to an auditor, whose report was in evidence. Among other findings of the auditor was a finding that the letter of March 16, written by the architects and described in the opinion, was given as a final certificate.

The other material evidence is described in the opinion. At the close of the evidence, the defendant asked for the following rulings:

"1. The plaintiff is not entitled to recover without producing a final certificate or showing that it was prevented from producing same by some act of the defendant or its agents.

"2. Article 9 of the contract requires an architect's final certifi-

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cate. The plaintiff has offered as a final certificate only the letter from Monks and Johnson dated March 16. This is not a final certificate under the terms of the contract.

"3. The final certificate should contain a final accounting between the parties showing credits and balances due and should certify that the work has been completed according to the terms of the contract."

"5. Even if the letter of March 16 is a final certificate it does not bind the defendant to the acceptance of work or materials not in accordance with the terms of the contract or preclude it from recoupment for such damage."

The rulings were refused. The presiding judge left it to the jury to determine whether the plaintiff procured a final certificate of the architects as required by the contract, giving to them among others the following instructions:

"No technical accuracy is required in the form of wording of this certificate. It isn't necessary, if I understand it, that the architects should use any particular set phrases, or that their certificate should be drawn up in any particular form, or that they should use any blank which may be provided for such certificates. Of course where the certificate is perfectly plain and there can be no doubt, no ambiguity, about its terms, it is for the court to say whether or not it does comply with the requirements of the contract. There may be cases, however, where the paper which is presented as a certificate upon its face is open to some doubt and there is some ambiguity about it. Now in this case I am going to leave to you the question of whether or not the paper, which is relied upon as a certificate, is one in fact. It seems to me that in this case it is within your province to say whether or not this paper is the final certificate of the architects."

The jury found for the plaintiff in the sum of $19,513.17. The defendant alleged exceptions, the bill of exceptions stating that the exceptions were intended only to raise the question, whether the letter from the architect to the plaintiff of March 16, 1912, could be found to be a final certificate under the terms of the contract and whether it precludes the defendant from recoupment for damages.

A. E. Yont, for the defendant.

W. C. Adams, for the plaintiff.

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BRALEY, J. The record recites that the defendant's exceptions "are intended only to raise the question whether the letter from the architects to the plaintiff of March 16, 1912, could be found to be a final certificate under the terms of the contract and whether it precludes the defendant from recouping for damages."

The auditor found that the defendant had suffered damages because the building had not been constructed in all details as required by the contract, but he apparently did not make any assessment because he ruled, that "the defendant was precluded by the final certificate from recoupment for such damages." The tenth article reads, "It is further mutually agreed between the parties hereto that no certificate given or payment made under this contract, except the final certificate or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part, and that no payment shall be construed to be an acceptance of defective work or improper materials."

The uncontradicted evidence, to the admission of which neither party objected, shows that during construction many changes were made, and "extras" ordered which were the subject of discussion between the architects and the plaintiff, and that during the period preceding the date of the action the amounts in dispute had not been settled or referred to arbitration as provided for in article twelve. The defendant however occupied the building at some time previous to the date of a letter that one of the architects wrote enclosing a letter which he proposed sending to the plaintiff, to which the defendant replied, "Your letter of acceptance" to the plaintiff "is correct in accordance with the understanding; . . ." and thereupon the letter was forwarded which is relied on as being the final certificate required under articles nine and ten. The material portions state, that "the building . . . which you have just completed for the . . . company is accepted subject, however, to the provision that the various items mentioned in our conversation with your Mr. Baffrey and with Mr. Freeman are satisfactorily attended to at once." The items are then enumerated, and before bringing suit the plaintiff as the defendant concedes complied with these requirements. But, notwithstanding the letter, the correspondence thereafter between the defendant and the plaintiff and between the plaintiff and the architects unequivocally shows the defendant as constantly asserting that the

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contract had not been fully performed in many important details, to remedy which it had been or would be put to large expenditures, while the plaintiff, inclosing a statement of its account, asked the architects "to go over this statement and let us know if you are able to issue the final certificate according to same or if any adjustment should be made to urge upon a prompt action to settle the controversy." The architect who during the correspondence apparently acted for the firm of architects named in the contract of which he was a member, was a witness at the trial and, upon being asked, "Up to the time you received this letter you had not made out any architect's certificate or any other statement beyond the letter . . . and you had not in any manner adjusted or determined on the amount of the balance due the plaintiff under the contract so that the exact figures could be put in the form of a certificate," replied, "I do not think that under the contract the way the parties looked at it, we could. . . . I think we took the stand that our letter of March 16 was sufficient."

While it is obvious that neither party understood that the letter had ended their difficulties leaving nothing more to be done, and that the final payment had become due, the letter, which at most is only a qualified or conditional acceptance of the building, does not specify the amount of the payment, or furnish any data from which it could be computed.

By article nine, "the final payment shall be made within forty-five days after the completion of the work included in this contract, and all payments shall be due when certificates for the same are issued." The forty-five days do not begin to run until the final certificate of payment is furnished, and it is settled by *Norcross Brothers Co.* v. *Vosé*, 199 Mass. 81, under a contract the same in form, that a letter containing acceptance of the building upon condition that the contractor is to remedy certain defects of workmanship or of materials, is not of itself a final certificate which can be treated as conclusive evidence of performance. Nor does the contract read that the final payment is to be made when the architects have accepted the building, and that such acceptance shall be conclusive upon the parties. If it did, a statement signed by them showing acceptance might be sufficient. *Leverone* v. *Arancio*, 179 Mass. 439, 442. *Glacius* v. *Black*, 50 N. Y. 145, 150. The architects also even if they were not to take evidence are empow-

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ered and required to act as if they were arbitrators, and, the final payment having been made dependent on their determination as manifested by the certificate, there can be no conclusive evidence entitling the plaintiff to the balance of the contract price less such deductions, if any, as they may determine, until this duty has been performed. *Loftus* v. *Jorjorian*, 194 Mass. 165. *Gilmore* v. *Courtney*, 158 Ill. 432.

The parties under the express terms of the contract were not required to make adjustments by which all disputes should be settled and the amount of the final payment fixed. It is implied from the instrument as a whole, that as the result of the architects' honest judgment the certificate or decision, which is to be final, shall also be complete. *Chism* v. *Schipper*, 22 Vroom, 1, 13. *Hudson* v. *McCartney*, 33 Wis. 331, 345. The contractor is entitled to know how much is finally coming to him concerning which as the plaintiff contends there can be no further controversy, and the owner has the right to be informed of the amount he has to pay within the time prescribed, so that he can make the necessary arrangements and avoid being subjected to the costs and annoyance of litigation to which he may have no defence. *Beharrell* v. *Quimby*, 162 Mass. 571. *Hathaway* v. *Stone*, 215 Mass. 212. *Wilson* v. *Borden*, 39 Vroom, 627. *Sharpe* v. *San Paulo Railway*, L. R. 8 Ch. 597, 609. The architects also under article three are in the first instance to determine what sums should be allowed for alterations, as well as whether any deductions are to be made for imperfect or incompleted work or unsuitable materials, and if neither party dissented their decision is final. *Norcross* v. *Wyman*, 187 Mass. 25. *Hebert* v. *Dewey*, 191 Mass. 403.

It is plain that, material alterations having been made, it was the duty of the architects to act as required. But the record shows that when the action was begun the amounts claimed by the plaintiff for changes or alterations, or "extras" ordered, had neither been approved by the architects nor submitted to arbitration under article twelve as suggested by them. The provision as to alterations did not relieve the plaintiff from its agreement to perform the work according to the plans and specifications as they had been modified. It would seem to be reasonably clear that under this condition of affairs the defendant ought not to be deprived of the protection of the contract.

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A certificate under article ten means, and was intended by the parties to mean, a statement in writing authenticated by the signature of the architects that the final payment, naming the amount, is payable to the plaintiff under the terms of the contract. *Wyckoff* v. *Meyers*, 44 N. Y. 143, 145. *St. John's College* v. *Aetna Indemnity Co.* 201 N. Y. 335, 340. It was such a certificate given under a contract which in all essential particulars corresponded with the contract in question, which was adjudged to be conclusive in *Hathaway* v. *Stone*, 215 Mass. 212.

The construction of the contract, and of the letter when read in connection with the contract, was a question for the court, and not for the jury to whom it was submitted. The plaintiff has offered as a final certificate only the letter, which as previously said is not in form or substance the final certificate called for under the contract. We are therefore of opinion that the defendant's second request, that "Article nine of the contract requires an architect's final certificate," should have been given, and the instructions under which the jury were permitted to find that the letter of acceptance was such a certificate were erroneous.

It may be added that while the letter of acceptance was sent with its assent, the question, how far, if at all, the letter operated as a waiver by the defendant of the right to insist upon the plaintiff's procuring a certificate as a condition precedent to maintaining an action for the unpaid balance of the contract price, and whether, if a waiver were found, the defendant can recoup for defective workmanship or materials, are questions not raised by the record, and not argued by counsel.

Exceptions sustained.

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EMERY AND COMPANY, INCORPORATED, vs. BOSTON AND MAINE RAILROAD.

Suffolk. March 4, 1918. — May 24, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Carrier, Of goods. *Railroad*. *Negligence*, In care of perishable goods. *Bill of Lading*.

Where a bill of lading issued by a railroad corporation for the transportation by rail of pickled herring contained no agreement of the carrier that the refrigerator car in which the herring were shipped should be iced by the carrier, and where the owner and consignee of the fish agreed with the carrier to make, and did make, an arrangement to replenish the ice, and the fish were spoiled by reason of the consignee's own failure to provide sufficient ice to keep them in good condition after their arrival in a freight yard of the carrier, the consignee cannot hold the carrier liable for his loss thus sustained.

Where the owner and consignee of one hundred and fifteen barrels of pickled herring, having been notified by a railroad corporation of their arrival in a refrigerator car at a freight yard of the corporation, found that by reason of warm weather the car needed re-icing and, knowing that the freight yard closed at five o'clock in the afternoon, between half past four and a quarter to five o'clock in the afternoon gave an order to an ice company to re-ice the car and the foreman of the ice company, knowing the hour of closing of the yard, sent a loaded ice team, which arrived at the yard at half past five or a quarter to six o'clock and failed to get admitted, and the fish in consequence were spoiled, and where, although it appeared that the consignee asked for and received from the railroad corporation permission to re-ice the car, yet it did not appear that delivery of the ice for this purpose was to be made in any other way than in accordance with the general regulations for the transaction of business at the yard and no application was made to the assistant yard master, who had authority to give instructions to keep the gates open, for permission to enter late, in an action by the consignee against the railroad corporation for his loss thus sustained, there is no evidence to submit to the jury of negligence on the part of the defendant.

CONTRACT OR TORT against the Boston and Maine Railroad by Emery and Company, Incorporated, as the owner and consignee of one hundred and fifteen barrels of pickled herring for the spoiling of the herring alleged to have been caused by the fault or negligence of the defendant. Writ dated May 27, 1914.

The plaintiff's declaration, as amended, was as follows:

"First count. And the plaintiff says the defendant is a common carrier for hire of passengers and goods and received for

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carriage to the plaintiff one hundred and fifteen barrels of pickled herring to be carried from Eastport in the State of Maine to Boston in the county of Suffolk; and that through the carelessness and negligence of its officers, agents and servants the Boston Ice Company, an agent of the plaintiff, was unable to gain access to the yard of the defendant in Boston for the purpose of re-icing said herring; and that in consequence thereof said herring were rendered unsalable for food purposes and that the plaintiff suffered great loss and damage. And the plaintiff being in doubt whether its action lies in contract or tort adds the following count in tort.

"Second count. And the plaintiff says that the defendant is a common carrier of goods for hire and that on or about September 9, 1912, through the carelessness, recklessness and negligence of the defendant, its officers, agents and servants a carload of fish belonging to the plaintiff was permitted to decay and its value to be destroyed.

"Wherefore, the plaintiff claims damages, both counts being for the same cause of action."

In the Superior Court the case was tried before *Dubuque*, J. The evidence is described in the opinion. At the close of the evidence the judge ordered a verdict for the defendant and reported the case for determination by this court, with the stipulation that, if the case ought to have been submitted to the jury, this court might order judgment for the plaintiff "for such of the items as the jury would have been warranted in finding in its favor;" otherwise, judgment was to be entered for the defendant on the verdict.

J. J. Cummings, for the plaintiff.

G. E. Kimball, for the defendant.

BRALEY, J. It either was uncontroverted or the jury would have been warranted in finding, that the defendant as the initial carrier on September 7, 1912, received at Eastport, Maine, one hundred and fifteen barrels of pickled herring for transportation to Boston in this Commonwealth, where the Union Freight Line or Union Freight Company as the last carrier received the car for delivery to the plaintiff, the consignee. The car arrived sometime in the forenoon of September 9, and the plaintiff's clerk in the afternoon having been informed by the defendant, "that the car of pickled herring had arrived at the yard," went to the freight office and

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obtained "permission to inspect the fish," which were found to be in good condition. But, because of the hot weather, the plaintiff's agent asked for and received permission to re-ice the car. It could be inferred that the car was of the type known as a refrigerator car. The clerk testified, "there was about a third of a bunker of ice on each end," but whether the car before its departure had been iced by the shippers or by the defendant did not appear. It was however agreed, that the defendant should "set the car" on a designated side track where it could be reached, and an order to an ice company to re-ice was accordingly given by the plaintiff between 4:30 and 4:45 P. M. The ice was dispatched about 5:20 P. M., and it would take about fifteen minutes for a team to go from the ice company's office to where the car in question had been placed. The foreman of the ice company who dispatched the ice knew the closing hour for freight in the yard or freight house was 5 P. M. The driver of the ice team, having arrived "at half past five or quarter of six," passed the first gate but the gateman at the second gate would not let him through, and, leaving "the team and two men behind him at the gate," he went to the ice company's office and reported to the foreman, who after making the attempt by telephone failed, as he testified, to get an answer from the defendant's usual place of business, and no further efforts to ice the car were made. The car, without having been iced, was switched to the track of the Union Freight Line where it was received at 8:40 P. M. on September 9.

The defendant does not contend that on September 10 when delivery was made by the Union Freight Line, the fish were in good condition. The car had been inspected not later than 4:30 P. M. on September 9, when the fish were found to be unspoiled; and between that time and 8:40 P. M. the car was received by the last and only connecting carrier.

It is true that the defendant made no contract to deliver the fish to the plaintiff, on whom the burden rested of proving its negligence before transferring the car to the Union Freight Line. *Farmington Mercantile Co.* v. *Chicago, Burlington & Quincy Railroad,* 166 Mass. 154. *Moore* v. *New York, New Haven, & Hartford Railroad,* 173 Mass. 335, 337.

But, in view of the nature of the shipment shown by the bill of lading, the condition of the weather and the shortness of time

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between the arrival of the car and delivery to the plaintiff, the jury could find that owing to defective icing the fish were in a damaged condition when the car left the defendant's yard. The plaintiff makes no contention of unreasonable delay or of any mismanagement in transportation except the defendant's neglect to re-ice. The bill of lading did not require the defendant to ice the car, and it is unnecessary to decide whether this duty had been undertaken by the defendant under its implied obligations as defined in *Smith* v. *New Haven & Northampton Railroad,* 12 Allen, 531, 533, 534, and *Evans* v. *Fitchburg Railroad,* 111 Mass. 142, 143. See also 4 R. C. L. Carriers, § 157, n. 1; 10 Ann. Cas. 171. The plaintiff was the owner and consignee and, as the record shows and the first count of the declaration alleges, agreed with the defendant to make and made an arrangement to replenish the ice. The agreement having been subsequent to the bill of lading was valid, and bound the plaintiff. *Henry J. Perkins Co.* v. *American Express Co.* 199 Mass. 561. *Taylor* v. *Finnigan,* 189 Mass. 568. And the consequences resulting from the plaintiff's own failure to provide sufficient ice are not imputable to the defendant. Nor can a party recover where his own negligence is as much the cause of the loss as the negligence of the defendant. *Squire* v. *New York Central Railroad,* 98 Mass. 239.

It is urged lastly that the refusal of the gateman to permit the ice wagon to enter the yard is negligence on the part of the defendant to which the loss of the fish could have been found by the jury to be attributable. If the arrangement for icing must have been understood by the parties as including access to the premises and the track where the car was to be placed, yet there is no evidence that delivery of ice for this purpose was to be made except in accordance with the general regulations of the defendant for the transaction of business at the yard. The plaintiff gave the order to the ice company without any further instructions. It is plain, of course, that in all which followed the ice company acted as the plaintiff's agent, and the foreman knew the rules of the railroad required the gates to be closed at a certain hour. But with this knowledge, as well as with knowledge that entrance to the yard could not be obtained thereafter without specific orders to the gateman, no application was made to the assistant yardmaster who "had full authority to instruct, if necessary, to keep the

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gates open," for permission to enter late. The attempt of the foreman after the wagon returned, and he was informed of the circumstances, to communicate by telephone with the defendant's officials, and getting no response, his abandonment of all further efforts to execute the plaintiff's order, cannot affect the defendant, which on the record was not charged with the performance of the duties owed to the plaintiff by its agent.

We are of opinion that no negligence of the defendant rendering it liable to damages either in contract or tort has been shown. The exceptions to the admission and exclusion of evidence not having been argued need not be considered, and, no error of law having been shown, the defendant is entitled to judgment on the verdict.

So ordered.

IDA P. ERICKSON *vs.* THOMAS G. BUCKLEY.
VICTOR F. ERICKSON *vs.* SAME.

Suffolk. March 13, 1918. — June 24, 1918.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Negligence, Of one controlling real estate. *Snow and Ice. Practice, Civil*, Exceptions, Amendment after verdict. *Notice. Husband and Wife.*

In an action against the owner of an apartment house by the occupant of an apartment therein for personal injuries sustained by falling on the outside steps of the house, controlled by the defendant and used in common by all the tenants, by reason of snow or ice negligently allowed to accumulate and remain thereon, there was evidence that the defendant had taken upon himself the duty of cleaning the platform and steps from ice and snow, that ice had formed on the edge of the platform and steps during the day preceding that of the plaintiff's injuries and that the janitor, whose duty it was to keep the sidewalk clear of snow and ice, negligently failed to notice the ice or to do anything to remedy the slipperiness of the steps and platform. There also was evidence that due notice of the time, place and cause of the injury was given to the defendant. *Held*, that the plaintiff was entitled to go to the jury.

In the case described above the declaration contained two counts, the first alleging a failure to keep the steps in repair and the second alleging a defective condition due to snow or ice or both. The only issue tried was that contained in the second count, which was tried fully on the merits. The judge refused to order a verdict for the defendant on either of the counts, and the jury returned a verdict for the plaintiff, the defendant alleging exceptions. *Held*, that, as the verdict

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was warranted by the evidence on the second count, on which the case was tried, the defendant was not harmed by the judge's refusal to order a verdict for him on the first count, which could be cured by the allowance of an amendment to the first count after verdict.

Under St. 1908, c. 305, as amended by St. 1913, c. 324, a husband, who has incurred expenses by reason of personal injuries sustained by his wife resulting from snow or ice, is required to give the statutory notice in order to maintain an action for his loss thus sustained.

A notice given by a wife under St. 1908, c. 305, as amended by St. 1913, c. 324, of personal injuries sustained by her resulting from snow or ice, which is confined by its terms to her claim for damages and was "given at her request and in her behalf. By her attorneys, . . ." is not a notice in behalf of her husband as the foundation of a claim by him for consequential damages arising from her injuries.

TWO ACTIONS OF TORT against the owner of an apartment house numbered 25 on Woodford Street in the part of Boston called Dorchester, the first by a married woman, occupying with her husband an apartment in the house, for personal injuries sustained by her on February 21, 1916, at about half past seven o'clock in the evening by falling on the outside steps of the house in the control of the defendant, which were used in common by all the tenants in the house, and the second action by the husband of the plaintiff in the first case for the loss of his wife's services and society and expenses for medicine, medical attendance and nursing incurred by reason of her injuries. Writs dated May 19, 1916.

The declaration in the first action contained two counts, the first count alleging that the steps were in a dangerous condition by reason of the negligence of the defendant in failing to keep them in repair, and the second count alleging that "said defect or want of repair was caused by and consisted in whole or in part of snow or ice or both," and that the plaintiff "gave the defendant due notice of the time, place and cause of said injury." The declaration in the second action also contained two counts containing corresponding allegations.

In the Superior Court the two cases were tried together before *J. F. Brown*, J. The evidence is described in the opinion. There was no evidence of any notice given by the husband of the time, place and cause of the accident to his wife, unless the notice given by the wife served the purpose of a notice in behalf of the husband also. At the close of the evidence the defendant in each case made a motion in writing that a verdict be ordered for the defend-

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ant. The judge denied these motions. The defendant then asked the judge to make the following rulings in the first case only, that of Ida P. Erickson:

"19. Upon all the evidence the plaintiff is not entitled to recover under the first count of the declaration.

"20. Upon all the evidence the plaintiff is not entitled to recover under the second count of the declaration.

"21. Upon all the evidence the plaintiff is not entitled to recover."

The judge refused to make any of these rulings, and submitted the cases to the jury, who returned a verdict for the plaintiff in the first case in the sum of $2,000 and a verdict for the plaintiff in the second case in the sum of $150. The defendant alleged exceptions.

The case was argued at the bar in March, 1918, before *Rugg*, C. J., *Braley*, *De Courcy*, & *Pierce*, JJ., and afterwards was submitted on briefs to all the justices.

L. A. Mayberry, for the defendant.

D. E. Hall, for the plaintiffs.

PIERCE, J. In the first action, in the absence of the defendant from the Commonwealth, a statutory notice of the accident was left at the business office of the defendant with his sister and managing clerk, who was authorized to receive legal notices, within the limitation of time for the service of such a notice prescribed by St. 1913, c. 324. The sister immediately sent notice of the accident to the defendant, who received it within ten days of the accident and thereupon wrote the plaintiff on March 16, 1916, "I learned a few days ago of your accident, and I wish to assure you of my sympathy in these trying days or weeks. I trust you are being cared for by skilled physicians, and that you have every reason to expect a speedy and perfect recovery." We are of opinion the jury would also be warranted in finding from the letter of the defendant to the plaintiff that the defendant received from the sister the notice itself. *Tobin* v. *Taintor*, 229 Mass. 174. No question is presented as to the sufficiency of the notice in matter of form or substance.

Upon the merits these actions were tried and went to the jury "solely upon the contention maintained by the plaintiff and disputed by the defendant that the accident was due to the negligence of the defendant's servants and agents in failing

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to keep that portion of the premises in question free from an accumulation of ice and to negligence in failing to remove said ice or [to] sand the same." At the close of the evidence the defendant made a motion to the court in writing to direct a verdict for the defendant in each case. The court denied the motion and the defendant excepted.

We are of opinion the evidence offered by the plaintiff was ample to warrant a finding that the defendant had taken upon himself the duty of taking care of the platform and stairs and of clearing ice and snow therefrom; that ice had formed upon the edge of the platform and stairs during the day preceding the plaintiff's accident and that the janitor, whose duty it was to keep the sidewalk clear of snow and ice, negligently failed to notice the ice or to do anything to remedy the slipperiness of the steps and platform. *Nash* v. *Webber*, 204 Mass. 419. *Callahan* v. *Dickson*, 210 Mass. 510. We do not think there is enough conflict in the testimony to warrant a re-statement and analysis of it here.

The plaintiff's declaration is in two counts. The first count does not allege the giving of a notice or make claim of a defect due solely to snow and ice, but alleges a defect in the platform and stairs. It follows that there was a variance between the allegation and proof. It appears from the certificate of the presiding judge, and from the charge, that the only issue tried was that contained in the second count. It therefore appears that the merits of the case have been tried fully and that no harm came to the defendant by the refusal to order a verdict on the first count.

In the second action, assuming that the wife had a cause of action and that damage and injury to the plaintiff resulted therefrom, the question presented is whether the plaintiff by St. 1908, c. 305, as amended by St. 1913, c. 324, was required to give notice of the time, place and cause of the injury or damage in the manner provided in R. L. c. 51, §§ 20, 21, 22, so far as these sections relate to injuries resulting from snow and ice. *Baird* v. *Baptist Society*, 208 Mass. 29. *McNamara* v. *Boston & Maine Railroad*, 216 Mass. 506.

The common law right of the plaintiff to recover for the expense to which he had been put by reason of the injury to the wife resulting from the negligence of the defendant, is indisputable. *Kelley* v. *New York, New Haven, & Hartford Railroad*, 168 Mass.

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308. *Nolin* v. *Pearson*, 191 Mass. 283. His right is not consequential upon the right of the wife because it once belonged to her and has been transferred to him. Her rights to damage for injury to person and property under the statutes are independent of his rights to compensation for like injuries, although their individual rights may have a common origin. In the prosecution of their several and independent rights there is no privity in the assertion of their demands; and a judgment in favor of a defendant in an action brought by either of them is not a bar to an action by the other. *Kelley* v. *New York, New Haven, & Hartford Railroad, supra. Duffee* v. *Boston Elevated Railway*, 191 Mass. 563. *Mulvey* v. *Boston*, 197 Mass. 178. *McCarthy* v. *Wood Lumber Co.* 219 Mass. 566, 570. "The actions are as independent of each other as are two actions founded on a collision of two teams, caused by the negligence of the defendant, one brought by the driver, a servant of the owner of the team, to recover for his personal injuries, and the other by the owner, to recover for damages to his horses and wagon. The defendant's liability for the damages in the two cases depends upon the same facts, but there is no privity between the plaintiffs. Each is enforcing an independent right." Knowlton, C. J., in *Duffee* v. *Boston Elevated Railway, supra.*

Under the employers' liability act, R. L. c. 106, and under the workmen's compensation act, St. 1911, c. 751, the common law right of a third person to recover for injuries sustained by him as a consequence of harm and injury coming upon another through the negligence of the defendant, is not barred by the neglect or refusal of that person to give notices which are conditions precedent to any right of recovery by that person, by a release or by a refusal to prosecute, for the reason that the rights of third persons are not included in the terms of the act. *Jordan* v. *New England Structural Co.* 197 Mass. 43, 46. *King* v. *Viscoloid Co.* 219 Mass. 420.

St. 1908, c. 305, as amended by St. 1913, c. 324, provides: "The provisions of sections twenty, twenty-one and twenty-two of chapter fifty-one of the Revised Laws, in so far as they relate to notices of injuries resulting from snow or ice, shall apply to actions against persons or corporations founded upon the defective condition of the premises of such persons or corporations, or of an adjoining way, whenever such defective condition is caused by,

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or consists in part of, snow or ice." R. L. c. 51, § 20, provides: "A person so injured shall . . . give . . . notice. . . ." The person injured and the nature of the injury to which § 20 relates is defined in § 18 as follows: "If a person sustains bodily injury or damage in his property by reason of a defect. . . ." And under a narrow construction of this statute it has been uniformly held that damages are given only for direct injury to the person and to property. *Raymond* v. *Haverhill*, 168 Mass. 382, 383. *Nestor* v. *Fall River*, 183 Mass. 265, 267. A like construction has been given to R. L. c. 171, § 1, relating to the survival of actions. *Smith* v. *Sherman*, 4 Cush. 408. *Nettleton* v. *Dinehart*, 5 Cush. 543. *Cutting* v. *Tower*, 14 Gray, 183. *Hey* v. *Prime*, 197 Mass. 474.

On the other hand, the right to recover for injuries resulting from a defective condition of premises caused by snow and ice is a common law right and embraces all injuries to persons or property direct or consequential, resulting from the negligent observance of a duty imposed on the owner of the premises through an express or implied obligation. The provision of St. 1908, c. 305, as amended, that notice shall be given in "actions" imports that notice shall be given in all kinds of actions which any person at common law has "against persons or corporations founded upon the defective condition of the premises . . . whenever such defective condition is caused by, or consists in part of, snow or ice." *Baird* v. *Baptist Society*, *supra*. *McNamara* v. *Boston & Maine Railroad*, *supra*. So construed the notice required to be given as a condition precedent to the right to maintain an action must appear to have been "given on behalf of the person who brings the suit," *Driscoll* v. *Fall River*, 163 Mass. 105, 108, and be given "for the purpose of fixing his right of action." *Carroll* v. *New York, New Haven, & Hartford Railroad*, 182 Mass. 237, 241.

The notices of Mrs. Erickson cannot be held to have been given on behalf of any other person injured, because such inference is excluded by the statement therein "that Mrs. Erickson proposes to hold you liable in damages for her said injuries. This notice is given at her request and in her behalf. By her attorneys. . . ." The express limitation of the notice to the claim of Mrs. Erickson distinguishes the case at bar from *Merrill* v. *Paige*, 229 Mass. 511.

It may be noted that under similar statutory provisions a separate notice by the husband was held to be necessary in an

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action by him to recover consequential damages for injuries to his wife sustained while travelling on a public highway. *McKeague* v. *Green Bay*, 106 Wis. 577. *Sargent* v. *Gilford*, 66 N. H. 543, 544.

In the first action, upon the allowance of an amendment to the first count to the effect that the accident was due in whole or in part to snow and ice and that due notice thereof was given to the defendant, the exceptions are overruled.

In the second action a verdict should have been directed for the defendant; and the exception to the refusal so to do must be sustained and judgment be entered for the defendant. St. 1909, c. 236.

So ordered.

JAMES FITZGIBBONS'S (dependent's) CASE.

Worcester. May 13, 1918. — June 24, 1918.

Present: RUGG, C. J., LORING, DE COURCY, CROSBY, & CARROLL, JJ.

Workmen's Compensation Act. Proximate Cause. Evidence, Presumptions and burden of proof.

In a claim under the workmen's compensation act, where the Industrial Accident Board has found, on evidence warranting such a finding, that the employee, who already had heart disease and colitis, sustained an injury arising out of and in the course of his employment that aggravated and accelerated the diseases from which he was suffering so that he died six days after the injury, an award of compensation to his dependent widow is justified.

In a claim under the workmen's compensation act a finding of fact, made by the Industrial Accident Board on evidence warranting such a finding in the exercise of their right to disbelieve any part of the evidence which in their opinion was not entitled to credit, is not open to review by this court on an appeal from a decree affirming the decision of the board.

APPEAL to the Superior Court under St. 1911, c. 751, Part III, § 11, as amended by St. 1912, c. 571, § 14, from a decision of the Industrial Accident Board awarding compensation to Bridget Fitzgibbons as the dependent widow of James Fitzgibbons, who died on September 27, 1916, when in the employ of the Worcester Gas Light Company, his death being alleged to have been the result of an injury received by him on September 21, 1916, arising out of and in the course of his employment.

The case was heard by *Thayer*, J. The evidence reported by the

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Industrial Accident Board is described in the opinion. The judge made a decree in accordance with the decision of the Industrial Accident Board, ordering the insurer to pay to the claimant a weekly compensation of $10 for a period of four hundred weeks from September 21, 1916. The insurer appealed.

The case was submitted on briefs.

A. H. Bullock & J. M. Thayer, for the insurer.

C. F. Campbell & J. C. Donnelly, for the dependent widow.

LORING, J. The Industrial Accident Board in this case found "that the employee, James Fitzgibbons, received a personal injury by reason of a strain due to the lifting of iron pipe, weighing from two hundred and fifty to two hundred and seventy-five pounds each, on September 21, 1916; that this strain was a material contributing cause of his death six days later from heart disease and colitis, which was pre-existing at the time of and was aggravated and accelerated by the injury of September 21." If the deceased received the personal injury in question it was a personal injury arising out of and in the course of his employment. No question was made on that score.

There was a conflict in the evidence as to the facts covered by the finding which we have just stated. The insurer has contended that the burden was upon the claimant to make out her case by a fair preponderance of the evidence and that taking all the evidence together the preponderance of it was against the claimant and not in her favor and therefore that the finding was as matter of law unwarranted. The contention is wholly without foundation. It ought not to be necessary to point out that the board was at liberty to refuse to give credit to any part of the evidence which in their opinion was not entitled to credit. *Lindenbaum* v. *New York, New Haven, & Hartford Railroad*, 197 Mass. 314, and the numerous cases following that decision. The question and the only question before us is whether there was any evidence which warranted the finding made by the board. See, for example, *Fisher's Case*, 220 Mass. 581; *Brightman's Case*, 220 Mass. 17. We are of opinion that there was. In effect the insurer is asking us to review the finding of fact made by the board. That we have no authority to do. *Diaz's Case*, 217 Mass. 36. *King's Case*, 220 Mass. 290.

Decree affirmed.

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GEORGE R. WALLACE *vs.* THOMAS P. COYNE & another & trustees.

Worcester. May 20, 1918. — June 24, 1918.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

Trustee Process. Impounded Property.

Property impounded by order of a police court for the purposes of the prosecution of a complaint "until further order of said court" cannot be reached by trustee process until the impounding has been brought to an end by a further order of the court.

In order to reach such impounded property by an attachment on trustee process it is not enough to show that the proceedings in which the property was impounded have been disposed of and that the time has come to bring the impounding order to an end. It is necessary to show that the further order of the police court has been made which alone can terminate the impounding.

The fact, that the district attorney who had charge of the prosecution in which the property was impounded was willing that the impounding should be ended, does not show that it has been ended.

Whether property impounded by such an order of court is held by its custodian as a public officer who is accountable for it merely as such officer within R. L. c. 189, § 31, cl. 3, it here was not necessary to consider.

TORT by George R. Wallace of Fitchburg against Thomas P. Coyne and Maurice J. Farrell, for the alleged conversion to their own use of certain jewelry, the property of the plaintiff, David W. Tinsley and Bernard H. Flaherty and the Safety Fund National Bank being summoned by trustee process as trustees. Writ dated October 30, 1917.

Tinsley and Flaherty, summoned as trustees, alleged in their answer "that, at the time of the service of the plaintiff's writ upon them, they had not in their hands or possession any goods, effects or credits of the said defendants, unless the court upon the following statement of facts shall decide otherwise. And further answering, the said trustees say that they received and are now holding, under an order for impounding made by the Police Court of Fitchburg in the cases of Commonwealth *vs.* Thomas P. Coyne and Commonwealth *vs.* Maurice J. Farrell, dated November 29, 1916, certain jewelry which was taken from the said Coyne and Farrell at the time of their arrests, a list of which is hereto annexed; that said order your trustees aver and believe was confirmed by the

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Superior Court, and has never to the knowledge of the said trustees been modified or vacated." Here followed a list of jewelry.

A supplemental answer of the trustees added copies of the petitions of the chief of police of the city of Fitchburg on which the orders impounding the jewelry were made, stating that the jewelry was found upon the persons of the two defendants upon their arrests on complaints for breaking, entering and larceny. The supplemental answer continued as follows: "And further answering, the trustee Flaherty says that on the day upon which the trustee writ was served upon him in this case, and previous to the service of said writ, he had called Edward T. Esty, the district attorney for Worcester County in whose district said Coyne and Farrell had been prosecuted and convicted, on the telephone, and asked Mr. Esty if there was any reason why the jewelry taken from Coyne and Farrell and held by him should not be turned over to Coyne and Farrell, or their attorneys, if demanded from him, and that at this time Mr. Esty, in his capacity of district attorney and acting as such for the government, stated that as district attorney he saw no reason why the said jewelry should not be turned over to the attorneys for Coyne and Farrell if demanded from the said Flaherty; that this jewelry about which the trustee Flaherty inquired of district attorney Esty was the jewelry a list of which is attached to the trustees' answer, and further that said jewelry is not the jewelry or goods alleged to have been stolen from the house of one Wallace, and for the larceny of which the said Coyne and Farrell were tried and convicted.

"And further answering, the trustees answer that at the time of the service of the plaintiff's writ upon them the defendants Coyne and Farrell had been convicted and sentenced in the Superior Court for the county of Worcester upon an indictment charging them with breaking, entering and larceny, as is more particularly shown by the records of said court, and that said sentence had been affirmed by the overruling of the defendants' exceptions in the Supreme Judicial Court on October 20, 1917, which date was prior to the service of the plaintiff's writ, in accordance with the opinion of said court in the case of *Commonwealth* v. *Coyne*, 228 Mass. 269."

The trustees moved that they be discharged upon their respective answers. The motion was heard by *Wait*, J., who made an

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order that the trustees be discharged upon their answer and supplemental answer. The plaintiff appealed.

The case was submitted on briefs.

C. C. Milton & F. L. Riley, for the plaintiff.

J. M. Hoy, E. P. O'Connell & D. J. McNerney, for the defendants.

LORING, J. The question in this case is whether certain jewelry impounded by an order of a Police Court "for the purposes of prosecution of this complaint until further order of the said court" can be reached by trustee process in another court before the impounding order has been brought to an end. The Superior Court held that it could not and the plaintiff took the appeal which is now before us.

The appeal is founded on the fact that the principal defendants (from whose persons the jewelry was taken when they were arrested on the complaint made to the Police Court in question) had been indicted, convicted and sentenced in the Superior Court for the crime on which the complaint to the Police Court was founded and that sentence had been affirmed by this court. But that fact goes no further than to show that the time had come for the Police Court to bring its impounding order to an end. The obstacle was that until the impounding order had been brought to an end the jewelry was in the possession and control of the Police Court and so not subject to be taken on a writ issuing out of another court. *Columbian Book Co.* v. *De Golyer*, 115 Mass. 67. *Tuck* v. *Manning*, 150 Mass. 211. *Gregory* v. *Merchants' National Bank*, 171 Mass. 67. The personal property in question in *King* v. *Ham*, 6 Allen, 298 (the case mainly relied on by the plaintiff) was taken and kept by the arresting officer of his own motion and not under an order of court.

The plaintiff also has urged in support of his appeal that on the day on which the trustee writ was served and before the service of that writ one of the trustees had asked the district attorney who conducted the prosecution of the principal defendants in the Superior Court, whether there was any reason why the jewelry should not be turned over to the principal defendants if they made a demand for it and that the district attorney "in his capacity of district attorney and acting as such for the government, stated that as district attorney he saw no reason why the said jewelry should not be turned over to the" principal defendants if demanded of the

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trustees. But that did not remove the obstacle. At most it showed that the district attorney was willing that the obstacle should be removed.

It is not necessary to consider the further defence set up, namely: That the jewelry was in the hands of persons as public officers for which they were accountable to the principal defendants as such officers within R. L. c. 189, § 31, cl. 3, as to which see *Gregory* v. *Boston Safe Deposit & Trust Co.* 173 Mass. 419; *Berlin Mills Co.* v. *Lowe*, 211 Mass. 28, 30; *Travelers Ins. Co.* v. *Maguire*, 218 Mass. 360.

The decisions of our own court referred to above are decisive of the question now before us. It is not necessary to examine in detail the cases in other jurisdictions relied on by the plaintiff.

Order discharging trustees affirmed.

ALBERT W. CROCKER & another, trustees, *vs.* ANNIE L. CROCKER & others.

Middlesex. November 20, 21, 1917. — June 25, 1918.

Present: RUGG, C. J., BRALEY, PIERCE, & CARROLL, JJ.

Devise and Legacy.

A testator by the residuary clause of his will gave the residue of his property to trustees, to pay one third of the net income to his widow during her life, to a nephew and a niece named each the sum of $1,500 a year during the term of their lives, to a certain charity the sum of $1,500 a year "and the balance of the income of the principal of the trust estate, quarterly, in equal shares to my said nephew . . . and to my said niece . . . during the term of their lives." He further provided as follows: "In case either my said nephew or my said niece dies before my said wife then I direct my said trustees to pay one third of the net income of the trust estate which the deceased received during his or her lifetime to the survivor, quarterly, for and during the term of his or her life, and one third to my said wife, quarterly, during the term of her life, and one third semiannually in equal shares to" two charities named. The testator's widow waived the provisions for her in the will. After the death of the testator the nephew named in the residuary clause died, and, the widow still surviving, the trustees brought a bill for instructions. *Held*, that the third of the income of the trust fund made payable to the testator's widow, by reason of her waiver, fell into the residue of the income and was to be distributed under the provisions quoted above in regard to "the balance of the income," which was the true resi-

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due of the income, and that the half share of the final income which had been payable to the nephew before his death must be distributed as intestate property, there being no provision of the will in regard to it, as a legacy which is a part of a residue lapses on the death of the legatee before its vesting and cannot again fall into the residue.

In the case above described it was *pointed out* that the will disclosed no reason for invoking the rule, which sometimes is called inaccurately the satisfaction of disappointed legatees, as illustrated by *Shreve* v. *Shreve*, 176 Mass. 456.

BILL IN EQUITY, filed in the Probate Court for the county of Middlesex on October 28, 1916, by the surviving trustees under the will of William B. Spalding, late of Lowell, who died on March 9, 1912, for instructions as to the distribution of income under the trust created by that will.

The Probate Court made a decree, from which Annie L. Crocker appealed. On appeal the case was heard by *Crosby*, J. The facts are stated in the opinion, where the material portions of the will are quoted. The single justice made a final decree, from which Annie L. Crocker and the Lowell General Hospital appealed.

H. F. Atwood & H. L. Brown, for the defendant Annie L. Crocker.

F. E. Dunbar, for the Lowell General Hospital, adopted as his brief the brief for Annie L. Crocker.

C. L. Newton, for the defendant Myra N. White.

F. P. Marble, for the Lowell Humane Society, adopted as his brief the brief for Myra N. White.

L. M. Bacon, for Myra N. White as the administratrix of the estate of Edward H. Nichols, submitted a brief.

RUGG, C. J. This is a bill for instructions brought by trustees under the will of William B. Spalding, who died in 1912 leaving a widow and as his next of kin a nephew, Edward H. Nichols, since deceased, and a niece, Annie L. Crocker. His widow waived the provisions of the will and still survives. Her waiver causes doubt as to the disposition of the estate under the will. It is apparent from other clauses of the will that there is to be no final distribution of the estate at least until after the death of the wife. The clauses governing the issues now presented are in these words:

"Fifth: — All the rest, residue and remainder of my estate both real and personal I give, devise and bequeath to my nephew Edward H. Nichols of Brookline in the County of Norfolk, Albert W. Crocker and Frederick Bailey both of said Lowell and their

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successors, in trust, to hold and manage the same and dispose of the income thereof in the following manner: — I direct my said trustees to pay to my wife Mary E. Spalding during the term of her life, one-third of the net income of the principal of the trust estate herein created, quarterly, or as much oftner as they deem best; to my nephew Edward H. Nichols of said Brookline and to my niece Annie L. Crocker wife of Albert W. Crocker of said Lowell each the sum of Fifteen hundred dollars during the term of their lives; to the Lowell Humane Society of Lowell, Mass., semiannually, or as much oftner as they deem best the sum of Fifteen hundred dollars; and the balance of the income of the principal of the trust estate, quarterly, in equal shares to my said nephew Edward H. Nichols, and to my said niece Annie L. Crocker during the term of their lives."

"Eighth: — In case either my said nephew or my said niece dies before my said wife then I direct my said trustees to pay one third of the net income of the trust estate which the deceased received during his or her lifetime to the survivor, quarterly, for and during the term of his or her life, and one third to my said wife, quarterly, during the term of her life, and one third semiannually in equal shares to said Lowell Humane Society and said Lowell General Hospital."

The cardinal and familiar rule in the interpretation of wills is to ascertain from the testamentary words, construed according to their natural meaning, the intent of the testator and then to give effect to that intent unless prohibited by some positive rule of law. It is manifest from this will that the testator made no provision for the event which has happened, namely the waiver by his widow of the provisions made by the will for her benefit. It is to be presumed, however, that the testator had in mind the possibility that she might pursue that course and knew that he could not by his will prevent her from doing so. *Upham* v. *Emerson*, 119 Mass. 509, 513. *Sawyer* v. *Freeman*, 161 Mass. 543, 547. It is not for the court to speculate as to what the testator might have done if the exact situation which has arisen had in truth been in his mind when making his will, but to determine the meaning of the words actually used and apply that meaning to the facts presented.

The effect of the waiver by the widow and the assertion of her statutory rights is to reduce the estate available for the payment of

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legacies. Other legatees must lose as a result of her action. The consequence, in the absence of expression of testamentary intent to the contrary, is that the loss must fall upon the residuary legatees because no definite sum or specific legacy is given to them. They take whatever is left undisposed of by other provisions. *Firth* v. *Denney*, 2 Allen, 468, 471. *Pace* v. *Pace*, 271 Ill. 114, 120, 121.

Clause Fifth of this will is a true residuary clause in form and substance. But it has within itself preferences and provision for a final residue: one third is given to his widow; three annuities, each of $1,500, are given to three different persons and "the balance" which in this connection is equivalent to a gift of the final rest, residue and remainder is divided equally between his niece and nephew. The word "balance" in its collocation is broad enough to include the income which but for her waiver would have gone to the widow. It is natural to presume that such income, undisposed of directly in the event which has occurred, should go to the residuary legatees in preference to others. That is the effect of the words which now have become operative. *Chase* v. *Dickey*, 212 Mass. 555, 565. *Batchelder, petitioner*, 147 Mass. 465, 468. *Thayer* v. *Wellington*, 9 Allen, 283. *Blight* v. *Hartnoll*, 23 Ch. D. 218. Since the widow has waived its provisions in her favor, the will is to be interpreted as if it contained no provision for her. *Brandenburg* v. *Thorndike*, 139 Mass. 102.

The reasonable interpretation of the fifth clause, which alone was operative up to December 16, 1913, when the nephew died, is that the three annuities shall be paid in full and that the entire rest, residue and remainder of the income shall be divided equally between the nephew and niece.

For the period since December 16, 1913, the eighth clause also must be considered. Disposition there is made, in the event of the death of either the niece or the nephew during the life of his wife, of the share in the net income theretofore received by the one deceasing. The net income received by the nephew during his life was made up of the $1,500 annuity and one half the income of the final residue. The provision of Clause Eighth is that one third of this total share shall go to the survivor, one third to the wife, and one third equally to two charities. The provision for the wife is as if never made because of her waiver. Its distribu-

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tion must be determined. That clearly falls into the residue of the estate and is governed by the terms of the residuary clause. Under the terms of that clause one half the final residue goes to the niece and one half to the nephew. But the nephew cannot take because dead. As to that share of the income there is intestacy. No provision is made by the will for the contingency which has happened. The residuary clause itself is silent in this particular. Where a legacy lapses which is a part of the residue it cannot fall again into the residue. It must pass as intestate property. *Lyman* v. *Coolidge*, 176 Mass. 7. *Dresel* v. *King*, 198 Mass. 546.

This is not a case where the waiver by the widow works acceleration of other shares, because the scheme of the will in its other clauses makes plain the testamentary desire that the ultimate disposition of the trust shall not become operative until the death of the wife, niece and nephew.

This is not a case for the application of the rule as to equitable compensation to legatees, disappointed in realizing the full benefactions provided by the testator because of his widow's waiver and the consequent depletion of the share they would otherwise receive. Loss resulting in that way to particular legatees ought to be apportioned as nearly equally as may be upon other legatees unless a different purpose is established by the will. *Firth* v. *Denny*, 2 Allen, 468. *Plympton* v. *Plympton*, 6 Allen, 178. But the general rule in this class of cases, already alluded to with supporting authorities, is that there is a presumption that such loss was intended to fall on the residuum unless a different purpose is disclosed by the will. This rule is the one applicable to the facts here disclosed. Reading the will with all reference to the widow eliminated, there is not any manifest method under the present circumstances to apportion the loss in a way to effectuate a testamentary purpose shown by the words used. It is more consonant with the general purpose of the testator, in view of the fixed rules of law with reference to which his will must be interpreted, not to invoke the rule often denominated satisfaction of disappointed legatees. Indeed, it would seem that disappointment in expectation is not the true ground for conferring a right to contribution, and that such right is raised only when, if not allowed, the purpose of the will is defeated, as for example in *Shreve* v. *Shreve*, 176 Mass. 456. That case is distinguishable from the case at bar. That was a case where

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as between two children of the testator the will manifested a plain purpose to make a proportional distribution. The waiver of the widow, considered by its effects alone, wrought a great disturbance of that proportion. In order to preserve that proportion and thus effectuate the intent of the testator, it was necessary to apply the principle of satisfaction of disappointed legatees. A somewhat similar decision is *Adams* v. *Legroo*, 111 Maine, 302. The present case is different in the general frame of the will.

The decree of the single justice must be modified in 3 (b) by substituting "one half (½)," being the one third (⅓) due her by the express terms of Clause Eighth as her share of the part formerly received by Edward H. Nichols, plus one sixth, being the one half, due her under the terms of the residuary part of Clause Fifth, of the one third share given by Clause Eighth to the widow of the part formerly received by Edward H. Nichols, which one third share has fallen into the residue by the widow's waiver, for "one-third (⅓);" and in the clause indicating the share to Annie L. Crocker and Myra N. White as heirs at law, by striking out "one third (⅓)" and substituting therefor "one sixth (⅙);" and as thus modified is affirmed.

Decree accordingly.

JOHN MARSCH *vs.* SOUTHERN NEW ENGLAND RAILROAD CORPORATION.

SAME *vs.* GRAND TRUNK RAILWAY COMPANY OF CANADA.

SAME *vs.* CENTRAL VERMONT RAILWAY COMPANY.

SAME *vs.* SOUTHERN NEW ENGLAND RAILROAD CORPORATION & others.

Suffolk. January 10, 11, 1918. — June 25, 1918.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Pleading, Civil, Demurrer, Declaration. *Contract,* Validity, Building contracts. *Arbitrament and Award. Jurisdiction. Fraud. Referee. Agency. Corporation. Practice, Civil,* Parties.

In an action of contract for the alleged breach of a contract in writing, where the defendant, in place of demurring to the declaration and assigning his causes of demurrer, moved to strike out certain portions of the declaration, it was *said*

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that each of the motions was an attempt to raise in an irregular and anomalous way a question of law, which at common law and under our practice act could be determined only on demurrer or by an objection to the admission of evidence when offered in proof of the alleged facts; but, the questions thus raised having been argued fully as if upon demurrer, the court proceeded to treat the motions as assignments of causes of demurrer, the defendant also having filed a demurrer to the declaration.

In an action by a contractor against a railroad corporation, organized in this Commonwealth, for alleged breach of a contract in writing for the construction by the plaintiff of a railroad from Palmer to a point in Blackstone adjoining the State line of Rhode Island, it appeared that it was provided in the contract that the chief engineer of the defendant should be "sole umpire to decide all such questions, matters, and disputes," should any misunderstanding arise between the parties "regarding any of the stipulations and provisions contained in this Contract, or the true intent and meaning thereof, or the manner of performance thereof, or of any part thereof," including "any arising regarding the amount and quality, character and kind of work performed and material furnished by the Contractor." The contract also provided that the plaintiff should receive payment for work under the contract only upon condition that he performed his part "in strict accordance with the plans and specifications and to the entire satisfaction and approval of the Engineer." It also provided that the presentation of certificates in writing of the engineer should be a condition precedent to any payment, "and such certificates shall be conclusive as to the amount to be paid to the Contractor." *Held*, that these provisions of the contract were valid, and that in order to state a cause of action of the contractor for a breach of this contract the declaration must allege the performance of the condition precedent by the approval and certificate of the defendant's engineer or that the performance of this condition precedent was excused.

In the action above described, the declaration alleged as excuse for not procuring the approval and certificate of the defendant's engineer, that "said engineer did not act in good faith and according to his duty . . . but that he acted wilfully, capriciously, fraudulently, unreasonably and without excuse in refusing to give certificates containing the proper amounts and quantities under a proper classification as provided under the terms of said contract." The contract provided in substance that the engineer's certificate "shall be final and conclusive between the parties" as to the measurements and valuations appearing therein "and shall not be questioned by either party" or set aside "on account of any legal defect therein or in this Contract, or on account of any informality, omission, delay or error in proceeding in or about the same or on any other ground or for any other reason, or upon any pretence, suggestion, charge or insinuation of fraud, coercion, collusion or confederacy . . . and actual fraud only shall disqualify him [the engineer] from acting as aforesaid." *Held*, that under the contract the allegations of the declaration above quoted stated no ground for questioning the decision of the engineer, who was to be disqualified as *quasi* arbitrator on no ground less than "actual fraud."

In the same case it was *held* that the provisions of the contract in regard to the conclusiveness of the engineer's certificates and to the qualifications of the engineer as arbitrator were not void because the engineer was an officer or agent of one of the parties to the contract and from the nature of his employment might be biased in his judgment.

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In the same case it appeared that the contract provided that the certificate to be given by the engineer "shall be final and conclusive between the parties hereto and shall not be questioned by either party . . . as to the Construction of this Contract, or as to any question of law or fact, or as to the measurements or valuations arising out of or incidental to the performance of this Contract or as to any breach thereof by either party hereto, or as to the payment or payments to be made for any work done or material provided in the completion of the whole work contemplated by this Contract, or as to the validity or sufficiency of the information on which any certificate of the Engineer shall have been given." *Held*, that this provision was not illegal as an attempt to oust the courts of their jurisdiction respecting the subject matter of the contract, because by the terms of the contract the contractor could have no right of action to which the jurisdiction of the court could attach until he should present a certificate of the engineer unimpeachable in the absence of fraud.

In the same case the declaration contained an allegation that the engineer "was under the absolute control and direction of the defendant, and said defendant could at any time by the terms of said contract dismiss said engineer and appoint any other person to act in his stead." *Held*, that these were not sufficient allegations of bias, fraud or prejudice to show collusion and fraud and were not enough to require judicial inquiry.

In the same case it was *held* that the plaintiff stated no cause of action in regard to extra work alleged to have been required of him by the defendant, because the allegations of the declaration did not bring the alleged extra work within the requirements of the contract.

In the same case it was *held* that allegations contained in the declaration seeking damages on the ground, that the defendant repeatedly interrupted and suspended the progress of the work for long periods of time and prevented the plaintiff from completing the work and the construction of the roadway and that such interruptions and suspensions were not ordered in good faith, stated no cause of action, because the contract contained the following provision: "Notwithstanding anything in this Contract contained, the Corporation shall have the right to suspend the progress of the work or any part thereof as often and for such time as they shall see fit . . . [and] the Contractor shall not have any claim against the Corporation for any damage which the Contractor shall sustain by reason of any delay in the progress of the work arising from such suspension or from any act or omission of the Corporation or any of its agents," and because the motive of the defendant in doing what it had a right to do under the contract was immaterial.

In the same case it was *held* that there was nothing contrary to public policy in an agreement like that contained in the provision of the contract last quoted above, when made by the parties voluntarily and advisedly, as it was in the present case.

In the same case it appeared that by the terms of the contract the defendant reserved the right to omit or deviate from the plans and specifications or work as the defendant might deem expedient, and the contract contained a provision that "no compensation shall be claimable by the contractor for any loss of anticipated profits because of such change, deviation, or omission," and it was *held* that an allegation in the declaration that "certain portions of the work, which by the terms of said contract the plaintiff was entitled to perform . . . were taken from the plaintiff . . . and given to other parties, whereby the plaintiff was deprived of the profit which would have accrued" to him, stated no

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cause of action, because under the contract the defendant had a right to do this.

The contractor, who was the plaintiff in the action above described, brought another action against a foreign railroad corporation, alleging that the defendant desired to extend its line of railroad through this Commonwealth but that the laws of this Commonwealth did not provide for the construction or operation by a foreign corporation of a railroad within its borders and that the defendant caused to be organized and incorporated in this Commonwealth the railroad corporation which was the defendant in the action first above described and which made the contract with the plaintiff there sued upon, that the defendant had the sole ownership and control of that Massachusetts corporation, controlling almost its entire capital stock, and that the principal officers and directors of the two corporations were identical, that the defendant "through the instrumentality of its *alter ego*," the Massachusetts corporation, entered into the contract with the plaintiff for the construction of the proposed portion of the defendant's line from Palmer to a point in Blackstone adjoining the State line of Rhode Island, and that the defendant was liable to the plaintiff for the breach of the contract sued upon in the action first above described. Upon demurrer it was *held* that the contract in question was made only with the Massachusetts corporation, which was separate and distinct from the defendant, that the motive of the defendant in acquiring control of the Massachusetts corporation was immaterial, that the Massachusetts corporation could not be treated as the defendant's "*alter ego*" or agent when openly contracting for itself in its own corporate name, and that accordingly only the Massachusetts corporation could be sued by the contractor on the contract made by it for the construction of the road in this Commonwealth.

In an action against both the Massachusetts corporation and the foreign corporation, it was assigned as a ground of demurrer that there was a misjoinder of parties, and it was *held* that it was improper to join the Massachusetts corporation as the agent of a declared principal with itself as principal in allegations of a joint undertaking with the defendant foreign corporation for which in the making of the contract with the plaintiff it was alleged to have acted as agent.

FOUR ACTIONS OF CONTRACT for alleged breaches by the respective defendants of a contract in writing between the plaintiff and the Southern New England Railroad Corporation for the construction of a railroad from Palmer to a point in Blackstone adjoining the State line of Rhode Island, the first action being against the Southern New England Railroad Corporation, a corporation organized under the laws of this Commonwealth, the second action against the Grand Trunk Railway of Canada, the third action against the Central Vermont Railway Company and the fourth action against all three of the corporations previously named as single defendants. Writs dated November 25, 1916, the *ad damnum* named in each being $3,000,000.

The material allegations contained in the declarations in the

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four cases are described in the opinion. In each of the first three cases the defendant demurred and in the fourth case all the defendants demurred. The defendant in each action also made the motions to strike out certain portions of the declarations which are stated in the opinion.

The portions of the declarations referred to in these motions were as follows:

"And the plaintiff further says that said engineer was prevented by the interference of the defendant from giving a certificate representing the true measurements and valuations computed in accordance with the terms of said contract and specifications and was precluded from estimating in good faith and to the best of his independent and uncontrolled judgment the true amounts and valuations of said materials as provided by the terms of said contract and specifications, more particularly in that he was under the absolute control and direction of the defendant, and said defendant could at any time by the terms of said contract dismiss said engineer and appoint any other person to act in his stead."

"And the plaintiff further says that the defendant has wholly failed to carry out its said agreement in that extra work was required of the plaintiff under the terms of said contract, for which, according to the terms of said contract, the plaintiff is entitled to be paid; that, although the engineer and the contractor have failed to agree on the sum to be allowed therefor, the engineer has, although often thereto requested, wilfully, capriciously, fraudulently, unreasonably and without excuse, refused to issue certificates for said work and construction based upon the actual cost of the material and labor with fifteen per cent of the labor added for profit and use of tools as provided by the terms of said contract; that the plaintiff has often and repeatedly notified the defendant of the failure of the engineer to provide said certificates and to act in accordance with the terms of said contract, but nevertheless said defendant has at all times failed and refused and still fails and refuses to make any payments for said work and construction as performed by the plaintiff under the terms of said contract.

"And the plaintiff further says that although he was at all times ready to perform and carry out his part of said agreement the

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defendant repeatedly interrupted and suspended for long periods the progress of said work and prevented the plaintiff from completing the work and construction of said roadway so that the plaintiff was put in a position whereby he could not proceed with the prosecution of said work. Nor was the construction of the road so suspended as to enable the plaintiff to undertake any other work or construction, particularly as by the terms of said contract he was bound to resume the prosecution of said work upon the written order of the engineer. And the plaintiff further alleges that said interruptions and suspensions were not ordered in good faith and for any legal cause or reason within the intention of said parties, but were solely for the purpose of harassing, embarrassing and annoying the plaintiff and for the purpose of causing him great inconvenience, expense and damage by reason of said interruptions and suspensions of said work in order to induce the plaintiff to refuse to proceed with said contract and to abandon the construction and completion of said roadway.

"And the plaintiff further says that the defendant has failed to carry out its part of said agreement in that it neglected and failed to cause instructions to be given by the engineer for the clearing of said right of way upon which the plaintiff was working. Nor did the defendant contract for the clearance of the right of way or removal of buildings or other structures on the right of way with other parties as provided under the terms of said contract whereby the plaintiff was continually delayed and held up in the prosecution and progress of said work and whereby the plaintiff incurred expense and damage and was compelled to clear said right of way from buildings and other obstructions in order to complete the construction of said roadway as required by the terms of said contract.

"And the plaintiff further says that certain portions of the work, which by the terms of said contract the plaintiff was entitled to perform in accordance with the terms of said contract, were taken from the plaintiff by said defendant and given to other parties, whereby the plaintiff was deprived of the profit which would have accrued from the performance of said portions of the work if done by the plaintiff under the terms of said contract."

The demurrers and the motions were argued before *J. F. Brown*, J., who in each of the cases made an order overruling the

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demurrer or demurrers and denying the motions. The defendants appealed from the several orders, and the judge, being of opinion that the issues raised by the demurrers and motions to strike out passed upon by his several orders were of such importance to the conduct of the actions that they should be determined by this court before further proceedings in the Superior Court, reported each of the cases for such determination.

C. A. Wilson, for the defendants.

A. Lincoln & L. Withington, (*E. H. Abbot, Jr.*, with them,) for the plaintiff.

PIERCE, J. These are four actions of contract, founded upon the alleged failure of each of the several defendants to perform its part of an unsealed written contract entered into on July 20, 1912, between the plaintiff and the defendant in the first action, for the construction by the plaintiff of a railroad from Palmer, Massachusetts, to the Rhode Island State line at a point in Blackstone, Massachusetts. In each action the plaintiff alleges that he has constructed the roadway according to the terms of the contract in conformity with the plans and specifications furnished him, and seeks to recover payment for the work done in accordance with the provision of the contract; which contract, among other things, provides in substance by clauses 1 and 19 that the chief engineer of the Southern New England Railroad Corporation, the defendant in the first action, shall be "sole umpire to decide all such questions, matters, and disputes," should any misunderstanding arise between the parties "regarding any of the stipulations and provisions contained in this Contract, or the true intent and meaning thereof, or the manner of performance thereof, or of any part thereof," including "any arising regarding the amount and quality, character and kind of work performed and material furnished by the Contractor."

By clause 20 the corporation agreed to pay the plaintiff the amounts set down in the schedule thereto, only upon condition that he did and performed all things to be done and performed on his part "in strict accordance with the plans and specifications and to the entire satisfaction and approval of the Engineer."

Clause 21 provides for monthly payments as the work progressed and for final payments upon the completion of the whole work, such payments, "less any sums which under any of the provisions

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of this Contract the Corporation may be entitled to deduct therefrom, shall be made . . . upon presentation of written certificate of the Engineer showing the value of such work computed as aforesaid and stating that the work for or on account of which such certificate is granted has been duly performed and executed to his satisfaction and in accordance with the plans and specifications. The presentation of such certificate . . . shall be a condition precedent to the right of the Contractor to receive or be paid the amount so certified as due and unpaid or any part thereof, and such certificate shall be conclusive as to the amount to be paid to the Contractor."

Clause 23 provides in substance that such certificate shall be final and conclusive between the parties as to the measurements and valuations appearing therein and shall not be questioned by either party or set aside "on account of any legal defect therein or in this Contract, or on account of any informality, omission, delay or error in proceeding in or about the same or on any other ground or for any other reason, or upon any pretence, suggestion, charge, or insinuation of fraud, coercion, collusion or confederacy . . . and actual fraud only shall disqualify him [the engineer] from acting as aforesaid."

The liability of the defendant is made conditional upon the presentation of the engineer's certificate, which presentation is expressly made "a condition precedent to the right of the Contractor to receive or be paid the amount" certified by the engineer. The allegation in the declarations in the several actions "that he [the plaintiff] has done and performed all acts and things which by the terms of said contract and agreement he was required to do and perform" is insufficient upon which to found a right of action. In addition thereto, it must be averred specifically that the condition precedent was performed or the want of that performance excused. R. L. c. 173, § 6, cl. 11. *Newcomb* v. *Brackett*, 16 Mass. 161. *Newton Rubber Works* v. *Graham*, 171 Mass. 352. *National Contracting Co.* v. *Commonwealth*, 183 Mass. 89. As his reason for the non-performance of the conditions precedent, the plaintiff alleges in his several declarations that "said engineer did not act in good faith and according to his duty . . . but that he acted wilfully, capriciously, fraudulently, unreasonably and without excuse in refusing to give certificates contain-

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ing the proper amounts and quantities under a proper classification as provided under the terms of said contract."

The defendant in each action moved to strike from the several counts of the several declarations the words "wilfully," "capriciously," "unreasonably" and "without excuse," each of which plainly is a characterization of the conduct of the engineer, and when proved is averred to be sufficient to excuse the non-performance of the condition precedent.

The defendant in each action also moved to strike out the paragraph of the several declarations commencing "And the plaintiff further says that said engineer was prevented" and ending with the words "any other person to act in his stead."

Also, to strike out the paragraph of the several declarations beginning with "And the plaintiff further says that the defendant has wholly failed" and ending with the words "under the terms of said contract."

Also, to strike out the paragraph of the several declarations between the words "And the plaintiff further says that although he was at all times ready" and the words "to abandon the construction and completion of said roadway."

Also, to strike out that part of the plaintiff's several declarations between the words "And the plaintiff further says that the defendant has failed" and the words "as required by the terms of said contract."

Also, to strike out that paragraph of the several declarations which commences with the words "And the plaintiff further says that certain portions of the work" and ends with the words "under the terms of said contract."

Each of these motions was an irregular and anomalous way of raising for decision a pure question of substantive law, which under the common law and our practice act can be determined only on demurrer or by an objection to the admission of evidence when offered in proof of the alleged facts. R. L. c. 173, §§ 14, 16, cl. 2. *Montague* v. *Boston & Fairhaven Iron Works*, 97 Mass. 502. *Saco Brick Co.* v. *J. B. Eustis Manuf. Co.* 207 Mass. 312, 315. The granting of such a motion may result in legal error; the denial thereof never can. *Gardner* v. *Webber*, 17 Pick. 407. *Gately* v. *Taylor*, 211 Mass. 60, 65. *Powers* v. *Bergman*, 197 Mass. 39. *Golding* v. *Wharton Saltworks Co.*

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1 Q. B. D. 374. *Duncan* v. *Hargrove*, 22 Ala. 150, 161. The motions were denied; and the issues raised thereby, together with certain other distinct issues raised by demurrers to the several counts of the declaration and hereinafter considered, were reported to this court under R. L. c. 173, § 105.

The questions of law attempted to be raised by the motion to strike out have been fully argued, and we therefore consider such questions on the footing of a demurrer to the allegations of fact in the declarations which the plaintiff asserts constitutes a sufficient excuse for his failure to secure the written certificates of the engineer before bringing his action. A comparison of the facts, alleged in the declaration in excuse of the non-performance of the condition precedent with the terms of the contract, limiting the right of either party to the contract to question the conclusiveness of the certificates of the engineer upon any ground other than "actual fraud," affords a sufficient demonstration that each of the alleged facts, if allowed to be proved, adds to the terms of the written contract a new and substantial ground or reason less than "actual fraud" for the disqualification of the engineer as *quasi* arbitrator.

At the trial, against the substantive rule of law that evidence is not admissible to vary the terms of a written instrument, evidence could not be received to prove facts which would change the terms of the contract. It is therefore plain that a demurrer must be sustained to the parts of the several declarations which are specifically indicated in the several motions to strike out, unless the contract itself, in so far as it relates to the conclusiveness of the certificates and to the qualifications of the engineer as arbitrator, shall be held to be void, because the engineer is an officer or agent of one of the parties to the contract or because the provisions referring disputes to the engineer as an arbitrator whose decision shall be final are broader than are permitted by the court. It would seem to be settled that the engineer or architect of one of the contracting parties legally may act as arbitrator of all disputes between the parties as to the construction of the contract or arising out of or incidental to the performance of the contract, if, in the absence of bad faith or fraud, he shall be chosen by all parties to the contract acting with knowledge of his employment, even though from the nature of the employment he may be unin-

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different and biased. *Palmer* v. *Clark*, 106 Mass. 373, 389. *Fox* v. *Hazelton*, 10 Pick. 275. *Strong* v. *Strong*, 9 Cush. 560, 569. *White* v. *Middlesex Railroad*, 135 Mass. 216. *Hebert* v. *Dewey*, 191 Mass. 403, 410. *Ranger* v. *Great Western Railway*, 5 H. L. Cas. 72. *Jackson* v. *Barry Railway*, [1893] 1 Ch. 238. The cases of *C. W. Hunt Co.* v. *Boston Elevated Railway*, 199 Mass. 220 and *Brocklehurst & Potter Co.* v. *Marsch*, 225 Mass. 3, deal with the appointment of a party and are distinguishable on that ground.

The provision that the certificate to be given by the engineer "shall be final and conclusive between the parties hereto and shall not be questioned by either party, . . . as to the Construction of this Contract, or as to any question of law or fact, or as to the measurements or valuations arising out of or incidental to the performance of this Contract or as to any breach thereof by either party hereto, or as to the payment or payments to be made for any work done or material provided in the completion of the whole work contemplated by this Contract, or as to the validity or sufficiency of the information on which any certificate of the Engineer shall have been given . . .," was agreed to between the parties to prevent disputes as to the quality of the certificate which the contractor was required to present as a condition precedent to his right to receive payment of the amount certified by the engineer. This provision is not illegal as an attempt to oust the court of its jurisdiction respecting the subject matter, because by the terms of the contract the contractor can have no right of action to which the jurisdiction of any court can attach until he shall present a certificate of the engineer unimpeachable in the absence of fraud. *Lewis* v. *Brotherhood Accident Co.* 194 Mass. 1, 4. *Martinsburg & Potomac Railroad* v. *March*, 114 U. S. 549. *Chicago, Santa Fe & California Railroad* v. *Price*, 138 U. S. 185. Nor do we think illegal the provision of the contract which provides for a reference to the engineer of all questions in dispute regarding the "amount and quality, character and kind of work performed and material furnished by the Contractor," as also "any of the stipulations and provisions contained in this Contract, or the true intent and meaning thereof, or the manner of performance thereof, or of any part thereof by either of the said parties," because such determination of necessity must be made by the engineer before he can settle the

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amount due the contractor and deliver the certificate as provided in the contract. *Palmer* v. *Clark, supra. Norcross* v. *Wyman,* 187 Mass. 25. *Old Colony Street Railway* v. *Brockton & Plymouth Street Railway,* 218 Mass. 84. *Boston Water Power Co.* v. *Gray,* 6 Met. 131, 167. *Hood* v. *Hartshorn,* 100 Mass. 117. *Audette* v. *L'Union St. Joseph,* 178 Mass. 113. *White* v. *Abbott,* 188 Mass. 99, 102. *National Contracting Co.* v. *Commonwealth,* 183 Mass. 89. *Hebert* v. *Dewey, supra.* We are of opinion the allegation "that said engineer was prevented by the interference of the defendant from giving a certificate representing the true measurements and valuations," imports not alone undue influence, but also that the engineer yielded to that influence. If such should be the case, such action would be a fraud and would leave the provision for obtaining the certificate of no effect. *Strong* v. *Strong, supra. Hebert* v. *Dewey,* 191 Mass. 403, 413.

We are of opinion the allegations, "more particularly in that he was under the absolute control and direction of the defendant, and said defendant could at any time by the terms of said contract dismiss said engineer and appoint any other person to act in his stead," are not sufficient allegations of bias, fraud or prejudice to show collusion and fraud and are not enough to require judicial inquiry. *Nichols* v. *Rogers,* 139 Mass. 146. *Nye* v. *Storer,* 168 Mass. 53, 55. *Garst* v. *Hall & Lyon Co.* 179 Mass. 588, 590.

We are of opinion the allegation contained in the several declarations "that the defendant has wholly failed to carry out its said agreement in that extra work was required of the plaintiff under the terms of said contract, for which, according to the terms of said contract, the plaintiff is entitled to be paid; that . . . the engineer has . . . wilfully, capriciously, fraudulently, unreasonably and without excuse refused to issue certificates," is insufficient as a statement of a cause of action, because if the right to receive payment for extra work is founded upon paragraph 73 of the specifications, it is not alleged that the work was "performed by the Contractor at the written request of the Engineer," because it is not alleged that the work performed was a "class of work not provided for by the prices mentioned in the contract," and because, if within the work to be done under paragraph 15 of the contract, it is not alleged that the engineer gave the con-

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tractor "written orders" for the work alleged to be extra work or that there was a compliance with the provision "The Contractor and Engineer shall, before the work called for by such order is commenced, ascertained and fix in writing signed by them respectively the precise changes as provided for . . . and the sum to be allowed therefor and to be added to the Contract price. . . . In no case and on no pretense shall any charge for extras or any additional sum be claimed by the Contractor or paid by the Corporation unless the requirements of this clause shall have been strictly complied with in all respects."

It is unnecessary to determine whether paragraphs 73 and 74 of the specifications are repugnant to paragraph 15 of the contract, as claimed by the defendant, because the plaintiff has not brought himself within either paragraph.

We are of opinion the allegations contained in the several declarations, in substance that although the plaintiff was at all times ready to perform his part of the agreement the defendant repeatedly interrupted and suspended the progress of the work for long periods of time and prevented the plaintiff from completing the work and the construction of the roadway, and "that said interruptions and suspensions were not ordered in good faith and for any legal cause or reason within the intention of said parties, but were solely for the purpose of harassing, embarrassing and annoying the plaintiff and for the purpose of causing him great inconvenience, expense and damage by reason of said interruptions and suspensions of said work in order to induce the plaintiff to refuse to proceed with said contract and to abandon the construction and completion of said roadway," are insufficient as a cause of action, because it is provided in paragraph 7 of the contract that "Notwithstanding anything in this Contract contained, the Corporation shall have the right to suspend the progress of the work or any part thereof as often and for such time as they shall see fit . . . [and] the Contractor shall not have any claim against the Corporation for any damage which the Contractor shall sustain by reason of any delay in the progress of the work arising from such suspension or from any act or omission of the Corporation or any of its agents." We are of opinion there is nothing contrary to public policy in an agreement of this kind which the parties have voluntarily and advisably made. The motive of the

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parties which induces them to action under a legal contract is immaterial.

The allegations in substance in the several declarations that the defendant "has failed to carry out its part of said agreement in that it neglected and failed to cause instructions to be given by the engineer for the clearing of said right of way upon which the plaintiff was working . . . whereby the plaintiff incurred expense and damage," is insufficient to state a cause of action. The contract nowhere provides that the defendant shall clear the right of way; and there is no allegation of the production of the engineer's certificate or of the refusal of the defendant or engineer to clear the right of way.

The allegation in substance in the several declarations that "certain portions of the work, which by the terms of said contract the plaintiff was entitled to perform . . . were taken from the plaintiff . . . and given to other parties, whereby the plaintiff was deprived of the profit which would have accrued" to him, is insufficient to state a cause of action, because the facts alleged are inconsistent with the right reserved to the Corporation under paragraph 15 of the contract to omit or deviate from the plans and specifications or work as it may deem expedient, and because of the further provision of that clause that "no compensation shall be claimable by the contractor for any loss of anticipated profits because of such change, deviation, or omission."

The defendant in the action against the Grand Trunk Railway Company of Canada and the defendant in the action against the Central Vermont Railway Company demurred to the first count, which is identical in each declaration except that a different railway company is made defendant. In substance, the first count alleges "that said defendant corporation desired to extend its line of operations to Providence, in the State of Rhode Island, . . .; that the laws of Massachusetts did not provide for the construction or operation of a railroad within the borders of said Commonwealth by a foreign corporation . . .; that the defendant . . . caused the Southern New England Railroad Corporation to be organized under the laws of Massachusetts . . .; that said Southern New England Railroad Corporation was organized by the defendant merely as an instrumentality whereby the defendant might secure authority under the law to build within the limits of Massachusetts

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the desired extension of railroad necessary to carry into effect said project and plan . . .; that the defendant has the sole ownership and control of said Southern New England Railroad Corporation; that the defendant controls almost the entire subscription of capital stock; that the principal officers and directors of the defendant and said Southern New England Railroad Corporation are identical; that . . . in the furtherance of said undertaking the defendant, through the instrumentality of its *alter ego*, the said Southern New England Railroad Corporation, entered into a contract with the plaintiff for the construction of that part of said extension which lies between the town of Palmer in the State of Massachusetts and the town of Blackstone in the State of Massachusetts, most of the terms of which contract appear in a certain written instrument with another instrument designated as 'Specifications for the Construction of the Roadway,' both instruments being hereto annexed, marked 'A'."

In substance and as argued, the defendants assign as ground for their demurrers (1) that the plaintiff's claim is against the Southern New England Railroad Corporation with which the contract was made, and (2) that the defendant cannot be joined as principal and as an undisclosed principal in the same suit on a single contract.

As to the first ground we are of opinion the demurrer should be sustained. The contract was made with the Southern New England Railroad Corporation, duly incorporated to do the work and incidentally to make all necessary contracts therefor. The contracting company was separate and distinct from either of the other defendant corporations, which were created by the laws of two and different foreign States. The declaration does not allege that the plaintiff was ignorant of the interest of either of the defendants in the contracting corporation; nor is there any allegation of concealment of the fact that the defendant corporations controlled the stock and the principal officers and directors of the contracting corporation. The identity of stockholders and the control of the contracting corporation does not operate to merge the corporations into one or to make either the agent of the other. *Richmond & Irvine Construction Co.* v. *Richmond, Nicholasville, Irvine & Beattyville Railroad*, 68 Fed. Rep. 105. *Salomon* v. *Salomon & Co.* [1897] A. C. 22.

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The motive of the defendant or defendants, that is, the desire of either of them to secure through the instrumentality of a corporation authority under the law to build the desired extension and thereby escape other than a restricted or limited legal liability for the acts and contracts of the corporation, cannot be regarded. Corporations, like individual stockholders, are distinct entities and neither can be treated as the "*alter ego*" or agent of the other when openly contracting for itself and in its own corporate name. *Peterson* v. *Chicago, Rock Island & Pacific Railway*, 205 U. S. 364, 392. *Gardiner* v. *Treasurer & Receiver General*, 225 Mass. 355, 370. *Brighton Packing Co.* v. *Butchers Slaughtering & Melting Association*, 211 Mass. 398, 403. *Salomon* v. *Salomon & Co. supra*. *Montgomery* v. *Forbes*, 148 Mass. 249, is not an authority for the plaintiff. In that case the defendant attempted and failed to organize a valid corporation to take over his business. It resulted that the business carried on in the corporate name remained his personal business, with an individual liability for debts and obligations thereby incurred.

We are of opinion the pleader does not describe in different counts the same defendant in different capacities, but attempts to state the cause of action in such a way as to make the declaration accord with two different possible views of the legal descriptive ground upon which to found an action against either defendant. It follows that the demurrer for misjoinder must be overruled.

The defendants demurred to the several counts in the action against the Southern New England Railroad Corporation, the Grand Trunk Railway Company and the Central Vermont Railway Company, on grounds substantially as follows:

1. That the first count is improperly joined with the second and third counts, in that the first count purports to set out a cause of action against the Grand Trunk Railway Company and the Central Vermont Railway Company while the second and third counts purport to set out a cause of action against all three defendants. As to this contention we are of opinion the first count does purport to set out a cause of action against the Southern New England Railroad Corporation as well as the other defendants, by the allegation "that on or about the 20th of July, 1912, in the furtherance of said project and undertaking, the defendants,

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through the instrumentality of their Massachusetts personality, the said Southern New England Railroad Corporation, entered into a contract with the plaintiff."

2. That the declaration improperly joins the first count purporting to set forth a cause of action against all the defendants as principal with the second count, wherein all the defendants are named as principal and the Southern New England Railroad Corporation is also charged as agent of the other defendants. As to this contention we are of opinion it was improper and error to join in the second count the Southern New England Railroad Corporation as agent of a declared principal, with itself as principal, in a common and joint undertaking with the other defendants for which in the making of the contract with the plaintiff it is alleged to have acted as agent. As agent, the Southern New England Railroad Corporation could have been sued separately to judgment; or it could have been sued jointly as principal with the other defendants as principal, and the action proceed against all parties until it appeared with reasonable certainty that one of the defendants was the agent of the others. The plaintiff would then be put to his election whether he would look to the agent or to the principals. *Raymond* v. *Crown & Eagle Mills*, 2 Met. 319. *Weil* v. *Raymond*, 142 Mass. 206, 213. *Estes* v. *Aaron*, 227 Mass. 96. *Gavin* v. *Durden Coleman Lumber Co.* 229 Mass. 576. The demurrer should be sustained.

There is no misjoinder between the several counts and the third count. The third count is upon an account annexed and in itself is assumed to contain all necessary allegations to render the defendants liable upon any common count. *Noble* v. *Segal*, 214 Mass. 159.

3. The defendants also demurred for the reason alleged and examined in the opinion in the actions against the Grand Trunk Railway Company and the Central Vermont Railway Company. In these actions we have considered these several grounds of demurrer, and need not repeat what has been there said.

It follows that the motions to strike out should be allowed and the demurrers severally sustained.

So ordered.

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THOMAS E. MORAN'S CASE.

Suffolk. February 4, 1918. — June 25, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

Workmen's Compensation Act, Appeal, Compensation to minor whose wages may be expected to increase.

An appeal from a decree made by a judge of the Superior Court in a claim under the workmen's compensation act was taken by the employee on the day the decree was made and was not entered in this court until nearly three months later. Before that time the insurer had filed a motion that the appeal be dismissed for want of prosecution and a judge of the Superior Court had made an order allowing the motion unless the appeal should be entered in this court within thirty days, and the appeal was entered within that time. On the argument of the appeal the insurer filed a like motion in this court that the appeal be dismissed because not presented seasonably to the court, and it was *held* that the Superior Court had jurisdiction of the motion and had fixed the time within which the appeal might be entered and that under the circumstances the motion to dismiss the appeal made in this court must be denied.

On an application to the Industrial Accident Board under the provision of the workmen's compensation act contained in St. 1911, c. 751, Part II, § 22, as amended by St. 1914, c. 708, § 8, by a minor "that he be compensated . . . by the payment of a lump sum," the board in hearing the application gave the employee, who was eighteen years of age when injured, the benefit of St. 1915, c. 236, and findings were made as to increases in earnings which reasonably might have been anticipated if there had been no injury and as to what the employee would be able to earn in his injured condition, and on these findings as a basis the board awarded a lump sum, which was affirmed by a decree of the Superior Court. There was evidence which might have supported a somewhat larger award. On appeal it was *held* that the findings of the board, resting upon evidence whose weight and credibility were wholly for their consideration, could not be disturbed.

APPEAL to the Superior Court under St. 1911, c. 751, Part III, § 11, as amended by St. 1912, c. 571, § 14, from a decision of the Industrial Accident Board, upon an application of Thomas E. Moran, made under St. 1911, c. 751, Part II, § 22, as amended by St. 1914, c. 708, § 8, and under St. 1915, c. 236, for compensation by the payment of a lump sum, by which decision the board awarded to him the sum of $680.25. He previously had been awarded compensation for an injury sustained on Novem-

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ber 4, 1915, when he was eighteen years of age, from a permanently disabling injury, by the loss of vision in his right eye, arising out of and in the course of his employment by the Stafford Company, a corporation doing business in the village of Readville, a part of Boston.

The case was heard by *Fox*, J. The evidence reported by the Industrial Accident Board is described in the opinion. The judge made a decree in accordance with the decision of the Industrial Accident Board; and the employee appealed.

The appeal was taken on the date of the decree, which was May 14, 1917. It was not entered in this court until August 6, 1917. In the meantime on July 10, 1917, the insurer had filed in the Superior Court a motion to dismiss the appeal for want of prosecution. This motion was heard by *J. F. Brown*, J., who on July 16, 1917, made an order that "the motion to dismiss the appeal is allowed, unless the papers are prepared and entered in the clerk's office of the full court within thirty days from the date of this order." The appeal was entered within the thirty days. At the argument of the appeal before this court the insurer filed a motion that the "appeal be dismissed because not seasonably presented to this honorable court." This motion was denied by the court by an order made on June 24, 1918. The rescript in the case was dated June 25, 1918.

P. P. Coveney, for the employee.

E. C. Stone, for the insurer.

RUGG, C. J. This is a proceeding under the workmen's compensation act, St. 1911, c. 751, where the employee was dissatisfied with the decision of the Industrial Accident Board and caused proper papers to be entered in the Superior Court for the purpose of contesting it. A decree was made and entered in the Superior Court in accordance with the report of the Industrial Accident Board on May 14, 1917. An appeal by the employee was taken on that date. It was not entered in this court until August 6, 1917, nearly three months later. In the meantime a motion had been filed by the insurer in the Superior Court to dismiss the appeal for want of prosecution or because not entered "forthwith" in this court. R. L. c. 159, § 19, as amended by St. 1911, c. 284. See R. L. c. 173, § 117. On July 16, 1917, the Superior Court made an order that the appeal be dismissed unless

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entered within thirty days from the date of the order. The appeal was entered on August 6, 1917.

The Superior Court had jurisdiction of the motion. R. L. c. 173, § 115, as amended by St. 1915, c. 111. *Griffin* v. *Griffin*, 222 Mass. 218. See *Daly* v. *Foss*, 209 Mass. 470, where the statutes and the cases are reviewed. *Carpenter* v. *Fleming*, 177 Mass. 525.

Subsequently, after the appeal was entered in this court, the insurer moved that the appeal be discharged and the case sent back to the Superior Court on the ground of diminution of the record, the matters alleged relating to the motion to dismiss the appeal. See *Doherty's Case*, 222 Mass. 98. That motion was denied after hearing.

At the argument of the case on its merits the insurer offered a motion that the appeal be dismissed because not entered in this court forthwith as required by the statute. Manifestly under the circumstances here disclosed that motion must be denied.

No reversible error is disclosed on this record. The employee, when about eighteen years of age, received permanently disabling injuries arising out of and in the course of his employment by a subscriber under the act. After receiving weekly compensation for a time, being still a minor, he made application to the board to "provide that he be compensated . . . by the payment of a lump sum," as provided by Part II, § 22 of the act as amended by St. 1914, c. 708, § 8. The board proceeded to consider that application, giving the employee the benefit of St. 1915, c. 236, to the effect that he was of such age and experience when injured that under natural conditions his wages would be expected to have increased. Findings were made somewhat in detail as to increases in earnings which might reasonably have been anticipated if there had been no injury, and as to what the employee would be able to earn in his injured condition, and on these as a basis the board awarded a lump sum. It is not necessary to analyze these findings and the award with particularity. There was evidence which might have supported a somewhat larger award. But the whole question was one which involved a consideration of the weight to be given to evidence. The credibility of the testimony was wholly for the board. The estimate as to future earnings involved also an examination of the boy and insight into his probable

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quickness of perception and general reliability. These were pure matters of fact depending more upon the application of sound judgment to a practical problem of human nature than upon an accurate arithmetical calculation. The circumstance that no specific award was made for a period of about ten weeks shows no error of law. Doubtless that was taken into account in making the order as to payment of the lump sum. The findings of the board, resting upon evidence whose weight and credibility were wholly for its consideration, cannot be disturbed. *Pigeon's Case*, 216 Mass. 51. *Cox's Case*, 225 Mass. 220.

Decree affirmed.

EMILY M. MAGUIRE *vs.* TAX COMMISSIONER.

Middlesex. March 4, 1918. — June 25, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Tax, On income. *Constitutional Law.*

The effect of the provision of the income tax law contained in St. 1916, c. 269, § 14, in connection with the final sentence of St. 1909, c. 490, Part I, § 23, cl. 5, of the general tax law, is that the income from property held in trust in another State by a trustee, who there is taxed for it, is exempted from taxation to the recipient of the income resident in this Commonwealth.

Under St. 1916, c. 269, §§ 2, 11, and St. 1909, c. 490, Part I, § 23, cl. 5, income received by a resident of this Commonwealth from intangible property held for his benefit by a trustee resident in another State and not taxable in that State is subject to an income tax.

The imposition by St. 1916, c. 269, called the income tax law, of a tax upon income received by a resident of this Commonwealth from intangible property held for his benefit by a trustee resident in another State and not taxable in that State is valid and does not violate any guaranty of the Fourteenth Amendment to the Constitution of the United States.

It here was *pointed out* that, whether a tax on the income received in Massachusetts by the beneficiary of property held in trust in another State and not taxed there be regarded as a tax on the right of the beneficiary to receive the income or as a tax on the income when received, in either event it is a property tax.

PETITION, filed in the Superior Court on October 5, 1917, under St. 1916, c. 269, § 20, by a beneficiary receiving income from a trust established by the will of Matilda P. MacArthur, late of Philadelphia in the State of Pennsylvania, and held as trustee by

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the Girard Trust Company, a corporation having its usual place of business in that city, appealing from the refusal of the Tax Commissioner to abate a tax of $29.98 alleged to have been assessed illegally on the sum of $499.63 received by the petitioner as such income.

The case came on to be heard before *Fox*, J., who at the request of the parties, without making any decision, reported it under St. 1917, c. 345, for determination by this court upon the petition and the answer admitting the allegations of the petition. The material facts are stated in the opinion.

The case was submitted on briefs.

R. W. Hale & J. M. Maguire, for the petitioner.

H. C. Attwill, Attorney General, *& W. H. Hitchcock*, Assistant Attorney General, for the respondent.

RUGG, C. J. The petitioner, a resident of Cambridge in this Commonwealth, prays in accordance with St. 1916, c. 269, § 20, for the abatement of a tax alleged to have been assessed illegally. The tax was levied upon income received during 1916 from a trust established by the will of a deceased resident of Pennsylvania. That trust now is and always has been administered at Philadelphia in that State by the Girard Trust Company, a Pennsylvania corporation having no place of business in Massachusetts, under appointment by a court of competent jurisdiction in that State. The trust fund consists of mortgages, stocks and bonds. All the securities, documents and other evidences of title of the property belonging to the trust at all times since its creation have been kept physically in the exclusive custody of the trustee in Philadelphia. Some of these securities were taxable and taxed to the trustee in Pennsylvania. The rest were not so taxed or taxable under the laws of Pennsylvania. Of these latter there were bonds of three corporations exempted from direct taxation to the trustee because the debtor corporations under a Pennsylvania statute paid to that State a tax for and in behalf of the owners of the bonds. Certificates of the Southern Railway Equipment Trust were exempt from such taxation because all payments under them were rental for the use of tangible personal property, which in fact had a *situs* outside of Massachusetts, and shares of stock in two corporations were exempt from such taxation because the corporations paid to the State a tax on their capital stock.

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The income received by the petitioner from the securities taxed to the trustee in Pennsylvania is not subject to taxation under our income tax law. It is provided by § 9 of St. 1916, c. 269 (hereafter referred to as the income tax law), that "The income received by estates held in trust by trustees, any one of whom is an inhabitant of this Commonwealth or has derived his appointment from a court of this Commonwealth, shall be subject to the taxes assessed by this act to the extent that the persons to whom the income from the trust is payable, or for whose benefit it is accumulated, are inhabitants of this Commonwealth. The tax shall be assessed to such of the trustees as are inhabitants of the Commonwealth. Such part of the income of intangible personal property held in trust as is payable to or accumulated for persons who are not inhabitants of the Commonwealth, shall be exempt from the taxes imposed by this act. If an inhabitant of this Commonwealth receives income from one or more executors, administrators or trustees, none of whom is an inhabitant of this Commonwealth or has derived his appointment from a court of this Commonwealth, such income shall be subject to the taxes assessed by this act, according to the nature of the income received by the executors, administrators or trustees." This section standing by itself is broad enough to include the income in question. But this section must be read in connection with the other terms of the income tax law in order to gather the complete intent of the General Court. These broad provisions of § 9 are cut down by § 11. Reference is made in the earlier part of that section to the exemption from taxation under St. 1909, c. 490, of "property, whether held by an executor, administrator, trustee or otherwise," after the income tax law shall take effect; and a later sentence, so far as material, is in these words: "This act shall not be construed to impose a tax upon any . . . person in respect to income derived from property exempted from taxation by provisions of law existing prior to the passage of this act." It is manifest from the phraseology of § 11 of the income tax law, that it was intended to apply to trustees so far as they may be within the general scope of any portion of it, because, as has been pointed out, they are named in the first part of the section.

The reference in the sentence quoted from § 11, to the provisions of law existing at that time, manifestly is to the general

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tax law, St. 1909, c. 490, Part I, § 23, cl. 5, as amended. It there was provided that "All personal estate, within or without the Commonwealth, shall be assessed to the owner in the city or town in which he is an inhabitant on the first day of April, except as provided in Part III and in the following clauses of this section: . . . Fifth, Personal property held in trust by an executor, administrator or trustee, except as provided in section thirty-seven of Part III, the income of which is payable to another person, shall be assessed to the executor, administrator or trustee in the city or town in which such other person resides, if within the Commonwealth; and if he resides out of the Commonwealth it shall be assessed in the place where the executor, administrator or trustee resides; and if there are two or more executors, administrators or trustees residing in different places, the property shall be assessed to them in equal portions in such places, and the tax thereon shall be paid out of said income. If the executor, administrator or trustee is not an inhabitant of the Commonwealth, it shall be assessed to the person to whom the income is payable, in the place where he resides, if it is not legally taxed to an executor, administrator or trustee under a testamentary trust in any other State." The final sentence of that clause has direct reference to the taxation of trust property held by a foreign trustee for the benefit of a resident *cestui que trust*.

It is of no consequence in this connection that this sentence does not occur in Part I, § 5 of the general tax law, which relates exclusively to exemptions of persons and property from taxation. It is none the less an exemption from taxation. It is described as "An act to exempt property . . . from double taxation" in the title of St. 1894, c. 490, by which it first became a part of our statute law. The substance of the provision is an exemption from taxation. The purpose of this provision doubtless was to avoid duplicate taxation of the same property in two different sovereignties. It cannot be presumed that the same legislative purpose did not continue when the tax on incomes was substituted for certain other kinds of property tax. Moreover, § 5 of Part I does not purport to include all exemptions, for other sections of the general tax law relate to the same subject. See, for example, Part I, §§ 6, 8, 16, 17, 19. The classification of exemptions in *Watson* v. *Boston*, 209 Mass. 18, 22, does not pur-

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port to be comprehensive. While the income tax law made a complete change in the basis of taxation of intangible property, there is nothing to indicate that it was designed to return to duplicate taxation of trust property even though it might be in degree less burdensome than was illustrated in *Hunt* v. *Perry*, 165 Mass. 287. No reason is perceived for narrowing the plain exemption of § 11 of the income tax law and excluding from its operation the clear exemption of the final sentence of Part I, § 23, cl. 5 of the general tax law. It is more consonant with the canons of statutory interpretation to construe the income tax law as a consistent and harmonious whole, the apparently absolute provisions of one section being modified by the equally explicit limitations of another section, than by construction to import into one section an exception which is not readily discernible there and which in this particular would involve recurrence to a kind of double taxation heretofore expressly discarded by the Legislature.

The effect of § 11 of the income tax law in connection with the final sentence of § 23, cl. 5 of the general tax law, both already quoted, is that property held in trust in a sister State by a trustee there taxed therefor, is expressly exempt from taxation to the *cestui que trust* here resident. These lucid words are precisely applicable to circumstances like those here disclosed. There is no reason why these words should not be given their natural effect. A reason for this exemption under the existing income tax law is not far to seek. In the ordinary case of direct individual ownership of intangible securities there is no taxation except at the domicil of the owner, because in most instances taxation of that kind of property is based on the maxim *mobilia sequuntur personam*. There are some exceptions even to this rule. For instance, debts for purposes of taxation may under appropriate conditions have a *situs* at the residence of the debtor as well as of the creditor. *Liverpool & London & Globe Ins. Co.* v. *Orleans Assessors*, 221 U. S. 346, 354. So also may shares of stock in corporations by express statute have a taxable *situs* at the domicil of the corporation as well as at the residence of the shareholder. *Corry* v. *Mayor & Council of Baltimore*, 196 U. S. 466. *Bellows Falls Power Co.* v. *Commonwealth*, 222 Mass. 51. But the general rule still obtains that intangibles have a taxation *situs*, and in practice usually their only taxation *situs*, at the residence of the owner. *Fidelity &*

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Columbia Trust Co. v. *Louisville*, 245 U. S. 54. This being so, the imposition of an income tax such as is levied by our income tax law is based on the theory that the income tax is the only tax which in justice ought to be imposed in respect of such ownership, especially because in general the property represented by such intangibles contributes to the support of government in some other form. See *Hawley* v. *Malden*, 232 U. S. 1, 13 and *Simplex Electric Heating Co.* v. *Commonwealth*, 227 Mass. 225.

But the ownership of property held in trust in a sense is divided. The legal title is in the trustee, but the entire beneficial interest is in the *cestui que trust*. In such cases it is quite possible that the property may be taxed to the trustee as the legal owner in the State of his residence, regardless of the residence of the *cestuis que trust*. That has been our own law. *Welch* v. *Boston*, 221 Mass. 155. *Crocker* v. *Malden*, 229 Mass. 313. It doubtless was felt to be inequitable in such instances to compel the *cestui que trust* to pay another tax to this Commonwealth. Although our statute is now changed in this respect by § 9 of the income tax law, so that this Commonwealth no longer taxes the resident trustee for intangible personal property held for the benefit of non-residents, yet the reason for the exemption from taxation of the resident *cestui que trust* whose trustee, resident in another State, has there paid a lawful tax in respect of the trust property, still remains in principle. It is only in degree that its importance is diminished by the change in the scheme and rate of taxation.

This result receives some confirmation from the provision in the concluding paragraph of § 5 of the income tax law, to the effect that "income derived from property not subject to taxation under chapter four hundred and ninety of the acts of the year nineteen hundred and nine and acts in amendment thereof and in addition thereto . . . shall not be taxed under this act." It is manifest from what has been said already that the property from which this income is derived was not subject to taxation under St. 1909, c. 490, Part I, § 23, cl. 5.

The validity of the portion of the tax, assessed upon income from securities not taxable and not taxed to the trustees under the laws of Pennsylvania, must be considered next. It is not contended that income from this source is not taxable according to the terms of our income tax law. The position of the petitioner

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upon this branch of the case is that in this respect the income tax law is unconstitutional in that it operates to take her property without due process of law, and in other respects violates her fundamental rights.

It is plain that if the intangible property, legal title to which is held by the trustee in Pennsylvania, were owned in absolute ownership by the *cestui que trust* resident here it legally would be taxable to her here. That is settled so far as concerns the Constitution of this Commonwealth, by *Hawley* v. *Malden*, 204 Mass. 138, and the many cases there collected, and so far as the Federal Constitution is concerned, by the same case on writ of error in 232 U. S. 1. The question, whether the nature of the right of a *cestui que trust* in a trust held in a sister State is such as to be subject to taxation here, was before this court in *Hunt* v. *Perry*, 165 Mass. 287. In that case the beneficiary of a trust fund, created under the will of a deceased resident of Maine, held in that State by trustees there resident and appointed by its courts, was taxed as a resident of this Commonwealth for her interest in the trust. It was said by Allen, J., speaking for the court (p. 291): "The statute under consideration rests on the ground that the *cestuis que trust* residing here have a beneficial interest in the trust fund which is valuable, and that they are in effect the equitable owners thereof. An interest of this kind is property, which the Legislature may subject to taxation. *Bates* v. *Boston*, 5 Cush. 93. *Williston Seminary* v. *County Commissioners*, 147 Mass. 427. *Hathaway* v. *Fish*, 13 Allen, 267. . . . The defendants contend that the statute, if such is its true construction, is unconstitutional. . . . This argument, however, is met by the suggestions already made, that the *cestui que trust* is here, and his ownership or title is here, namely, the right to the income of the trust fund. The fact that the corpus of the trust fund is held by trustees who live elsewhere, and who hold under a will proved and allowed elsewhere, does not take away the power of the Legislature to subject the interest of the *cestuis que trust* to taxation here, if they live here." Other expressions are used in the course of that opinion, some of which cannot stand in the light of decisions of the United States Supreme Court in *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194, *Delaware, Lackawanna & Western Railroad* v. *Pennsylvania*, 198 U. S. 341, *Louisville & Jeffersonville Ferry Co.* v. *Kentucky*,

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188 U. S. 385, all rendered since *Hunt* v. *Perry*. But it does not seem to us that the soundness of the ground of that decision stated in the words quoted has been shaken by subsequent decisions. The exception to the general principle that personal property is taxable at the domicil of the owner seems to be rather strictly confined to chattels, live stock and other property which possesses a visible corporeal existence and which have acquired a manifest and permanent *situs* in another State. *Southern Pacific Co.* v. *Kentucky*, 222 U. S. 63. These decisions of the United States Supreme Court relied on by the petitioner do not appear to us to have wrought such ruin with the long established practice as to taxation in this Commonwealth as she contends. Indeed the soundness of the reasoning of the opinion in *Hunt* v. *Perry*, 165 Mass. 287, already quoted, appears to us to be sustained in principle by the most recent pronouncement of that court upon the subject in *Fidelity & Columbia Trust Co.* v. *Louisville*, 245 U. S. 54. That case had to do with the validity of a tax assessed by a municipality in Kentucky upon one of its residents upon moneys deposited in a bank in Missouri, derived from business there conducted and standing to his credit alone. It was conceded that these deposits were subject to taxation in Missouri. In the opinion upholding the validity of the tax in Kentucky it was said: "The present tax is a tax upon the person, as is shown by the form of the suit, and is imposed, it may be presumed, for the general advantages of living within the jurisdiction. These advantages, if the State so chooses, may be measured more or less by reference to the riches of the person taxed. Unless it is declared unlawful by authority we see nothing to hinder the State from taking a man's credits into account. But so far from being declared unlawful, it has been decided by this court that whether a State shall measure the contribution by the value of such credits and choses in action, not exempted by superior authority, is the State's affair, not to be interfered with by the United States, and therefore that a State may tax a man for a debt due from a resident of another State. *Kirtland* v. *Hotchkiss*, 100 U. S. 491. See also *Tappan* v. *Merchants' National Bank*, 19 Wall. 490. . . . The notion that a man's personal property upon his death may be regarded as a *universitas* and taxed as such, even if qualified, still is recognized both here and in England. *Bullen* v. *Wisconsin*, 240 U. S. 625, 631.

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Eidman v. *Martinez*, 184 U. S. 578, 586. *Attorney General* v. *Napier*, 6 Exch. 217. It has been carried over in more or less attenuated form to living persons, and the general principle laid down in *Kirtland* v. *Hotchkiss*, *supra*, has been affirmed or assumed to be law in every subsequent case. . . . It was admitted to apply to debts in *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194, 205. It is unnecessary to consider whether the distinction between a tax measured by certain property and a tax on that property could be invoked in a case like this. *Flint* v. *Stone Tracy Co.* 220 U. S. 107, 146, 162 *et seq.* Whichever this tax technically may be, the authorities show that it must be sustained." That reasoning appears to us to be equally applicable to the facts here disclosed. *State Tax on Foreign-Held Bonds*, 15 Wall. 300. *Metropolitan Life Ins. Co. of New York* v. *New Orleans*, 205 U. S. 395, 399. *Burke* v. *Wells*, 208 U. S. 14, 23. *Walker* v. *Jack*, 31 C. C. A. 462, (88 Fed. Rep. 578). It is of no consequence in this aspect whether the tax is levied on income in truth received by the resident taxpayer from intangible property held for his benefit by a trustee resident in a sister State or on intangible property owned by the taxpayer but all in fact kept by him in a sister State. There is not apparent to us any difference in principle between the two cases.

It is clearly implied by what was said by Mr. Justice Gray in *Dallinger* v. *Rapello* or *Rapallo*, 14 Fed. Rep. 32; *S. C.* 15 Fed. Rep. 434, that a tax against the beneficiary in the State of his residence for his interest in a trust held by a non-resident trustee in one of the sister States of his residence would be valid. See also *Putnam* v. *Middleborough*, 209 Mass. 456, 457, and *Brown* v. *Fletcher*, 235 U. S. 589, 599. "Although the right which the mortgage transfers in the land covered thereby is not the legal title, but only an equitable interest," *Savings & Loan Society* v. *Multnomah County*, 169 U. S. 421, 431, nevertheless it is plain that the debt with this equitable interest as security may be regarded for the purpose of taxation as situated at the domicil of the creditor. *Kirtland* v. *Hotchkiss*, 100 U. S. 491.

The trustee in Pennsylvania holds simply the legal title. He is possessed of the property in question solely for the benefit of the *cestui que trust*. The latter "is the real, substantial and beneficial owner of an estate which is held in trust as distinguished from the trustee in whom the mere legal title is vested."

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Larkin v. *Wikoff*, 5 Buch. 462, 474, affirmed on this point in 7 Buch. 589. The *cestui que trust* has important legal rights respecting the trust fund which are personal to her. They are rights in the nature of property. They cannot be taken away from her by arbitrary or irrational procedure. They attach to her person wherever she goes. One of these is the right to receive the income. That is a property right. The income when received is property. The tax here in question is a property tax. *Tax Commissioner* v. *Putnam*, 227 Mass. 522, 531, 532. Whether it be regarded as a tax on the right of the *cestui que trust* or a tax on the income as received, in either event a property tax is permissible. Of necessity a tax on income requires time as an element in its calculation. It must be levied on the income received during a period of time. It is not necessary that income be reinvested before it can be taxed. It may be spent as received and yet be subject to taxation. The contention of the petitioner in principle reaches much further than to the facts of the present case. In its logical application and extension it apparently would render invalid taxes on income from annuities, certificates in partnerships, associations and trusts and perhaps other sources, originating in sister States, and not having a place of business in this Commonwealth. Of course, if the principle is sound, its disturbing effect is no argument against its recognition and adoption. But a contention which in its results would seriously cripple the practical operation of any comprehensive system of State income taxation has no presumption in its favor and ought not to be adopted except because of compelling considerations. We perceive no such requirement as to the tax here in controversy. Whatever may be the effect of *Pollock* v. *Farmers' Loan & Trust Co.* 157 U. S. 429, 581; *S. C.* 158 U. S. 601, and *Brushaber* v. *Union Pacific Railroad*, 240 U. S. 1, 16, 17, upon the nature of the tax here in question under the Constitution of the United States, no binding decision appears to us to require that this tax be declared invalid. There is nothing inconsistent with the conclusion here reached in *Walker* v. *Treasurer & Receiver General*, 221 Mass. 600.

The income tax is measured by reference to the riches of the person taxed actually made available to him for valuable use during a given period. It establishes a basis of taxation directly proportioned to ability to bear the burden. It is founded upon

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the protection afforded to the recipient of the income by the government of the Commonwealth of his residence in his person, in his right to receive the income and in his enjoyment of the income when in his possession. That government provides for him all the advantages of living in safety and in freedom and of being protected by law. It gives security to life, liberty and the other privileges of dwelling in a civilized community. It exacts in return a contribution to the support of that government measured by and based upon the income, in the fruition of which it defends him from unjust interference. It is true of the present tax, as was said by Chief Justice Shaw in *Bates* v. *Boston*, 5 Cush. 93 at page 99, "The assessment does not touch the fund, or control it; nor does it interfere with the trustee in the exercise of his proper duties; nor call him, nor hold him, to any accountability. It affects only the income, after it has been paid by the trustee" to the beneficiary.

Our income tax law is founded upon interstate comity in this regard. It taxes only residents of this Commonwealth in respect of property in which they have a beneficial interest. It exempts resident trustees, although manifestly within the legal scope of its power, from taxation upon funds for the benefit of non-resident *cestuis que trust*. But it taxes resident *cestuis que trust* in respect of income actually received by them from trust property held in other States and not there taxed. This principle of taxation, just in itself and based upon recognition of like rights in sister States and manifestly aimed at the elimination of duplicate taxation upon the same property in different States, does not seem to us to violate any guaranty of the Fourteenth Amendment to the Federal Constitution.

No distinction in principle is manifest to us touching the income derived from the several classes of intangible securities held by the trustee and not taxed in Pennsylvania. See, in this connection, *Hawley* v. *Malden*, 232 U. S. 1, 13, and *Fidelity & Columbia Trust Co.* v. *Louisville*, 245 U. S. 54, 58.

An abatement of the tax as assessed is granted in accordance with the terms of the statute in the sum of $16.86.

So ordered.

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LAURENCE MINOT & others, trustees, *vs.* JOHN B. PAINE & others.

Suffolk. March 6, 1918. — June 25, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Power. Perpetuities, Rule against. Devise and Legacy. Marshalling of Assets.

Where a general power of testamentary appointment over a certain fund is given by will to a person who during his life is given only the income of the fund without power of appointment by deed, the period of valid executory limitation as determined by the rule against perpetuities for estates made by the exercise of the power of appointment begins with the time of the death of the donor of the power, although in ascertaining whether the limitation necessarily will take effect within the time of a life or lives in being at the death of the donor and twenty-one years afterwards, the facts to which the rule is to be applied are those that existed at the time of the death of the donee by whose will the power was exercised.

A testatrix, who had enjoyed the income of a trust fund during her life, and who had under the will of the creator of the trust a general power of appointment by will to dispose of the principal of the fund, exercised the power by her will and gave a fund to trustees to pay the income to her husband during his life and after his death "to hold the same for the benefit of my children." For three of her sons she provided that after the death of their father each should receive an equal proportionate share of the income of the fund "until he shall have attained the age of twenty five years, and on his attaining the age of twenty five years, to transfer and convey his equal and proportionate share of the trust fund to such son in fee, free of these trusts." The husband of the testatrix died fifteen years after her death, and all three of the sons referred to survived him. At the time of the death of the testatrix each of these three sons was old enough to reach necessarily the age of twenty-five years within twenty-one years from the time of his mother's death, and necessarily also within twenty-one years from the death of his father, both of their lives having been in being at the time of the death of the donor of the power. *Held*, that the remainders to the three sons were valid.

The same testatrix provided in the will for her fourth son, that, after the death of his father, his proportionate share of the fund should be set apart as a separate fund, of which he should receive the income during his life, and that at his death the income of an amount named should be paid to his adopted daughter, named, and that the remainder of his share should be paid to his issue, if any, then living and in default of issue should be added to the shares of the other children of the testatrix. This fourth son had no issue. *Held*, that the gifts of the income to the fourth son and to his adopted daughter were valid, such gift to the adopted daughter being vested although its enjoyment was postponed, but that the gift over of the remainder of the share was void under the rule against perpetuities, as it was not certain that this son might not live until more than twenty-one years after the death of both his mother and father and then leave issue.

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When one having a power of testamentary appointment after a life interest appoints to a person named an annuity with a general power to appoint by will a certain sum of money, this last power of appointment is void, because it is not restricted to the limitation required by the rule against perpetuities.

The testatrix who made the will in execution of the power above described also left a large estate of her own and in her will made no distinction between her own property and that appointed. The will contained numerous pecuniary legacies which plainly could be upheld as appointments under the power, and also a pecuniary legacy of which the limitation was void under the rule against perpetuities. By applying the appointed property to the gifts to the three sons of the testatrix first referred to above and to the other legacies which would be valid as appointments, the property subject to the power would be exhausted, leaving all other legacies, including the gift in remainder of the share of the fourth son, to be paid out of the testatrix's own property. It was the obvious intent of the testatrix that there should be no intestacy either as to the appointed property or as to her own estate. *Held*, that as a matter of construction the testamentary purpose to avoid intestacy should be carried out by first applying the property subject to appointment to those portions of the will which could operate lawfully as appointments, leaving the remaining gifts to be satisfied out of the testatrix's own estate and thus carrying into effect all the provisions of the will.

In the case above described it was *said* that it was unnecessary to determine whether the same result which was arrived at by the construction of the will could have been reached by the application of the doctrine of the marshalling of assets.

BILL IN EQUITY, filed in the Supreme Judicial Court on May 4, 1917, by the trustees under the will of Julia B. Paine, late of Weston, for instructions. The prayer of the bill asked for instructions upon the following matters:

"First: Whether any of the trusts declared in said will of Julia B. Paine are invalid under the rule of perpetuities as to any of the trust funds now held by them or as to any of the particular trusts declared in said will of said Julia B. Paine.

"Second: If it shall appear to the court that any of said trusts are invalid under said rule, whether it is now the duty of said trustees to marshal the funds held by them so as to satisfy such trusts entirely out of the property held by them which was derived from the individual property of said Julia B. Paine and use the appointed funds only for such of said trusts as are not invalid under the rule of perpetuities.

"Third: That this honorable court will instruct them as to their duties in distributing and holding said funds for the purpose of carrying out the various trusts set forth in said will of Julia B. Paine.

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"Fourth: That this honorable court will grant them such other and further relief as may be necessary or advisable in the premises."

The case came on to be heard before *Braley*, J., who reserved it upon the pleadings and an agreed statement of facts for determination by the full court. The material facts are stated in the opinion. The power of appointment referred to in the prayer for instructions was contained in the will of Hannah Farnham Lee of Boston, dated June 26, 1862, with a codicil dated June 5, 1863. Hannah Farnham Lee died on December 27, 1865. She gave the power of appointment to her granddaughter Julia Bryant, who was born on June 29, 1847, and on March 26, 1867, married Charles J. Paine, born on August 26, 1833. Julia Bryant Paine died on September 4, 1901. Charles J. Paine died on August 12, 1916. The will of Julia Bryant Paine was dated August 31, 1901.

F. Brewster, for the trustees, stated the case.

J. Wiggin, for the defendants Mary A. Winsor and others.

A. P. Stone, for the defendant Louise Osgood Koopman, also for the defendants Mary A. Winsor and others.

F. Ranney, (*T. Allen, Jr.*, with him,) for the defendant Margaret D. Osborn.

G. M. Palmer, for the defendants John B., Charles J. and Frank C. Paine.

L. Bond & A. R. Pike, for the defendant Salome B. Fisher, submitted a brief.

RUGG, C. J. The main question in this case is whether in the case of a power to appoint property given by will, to be exercised solely by the will of the donee of the power, the period established by the rule against perpetuities is to be reckoned from the creation or from the exercise of the power. That precise question never has been decided in this Commonwealth. It has arisen in England and in some of the other States.

In *In re Powell's Trusts*, 39 L. J. Ch. 188, it was held by Vice Chancellor James that a power vested in a daughter by the will of her father to appoint by will after the termination of a life estate "being exercisable only on her death, was not equivalent to her having the absolute ownership of the fund which was tied up for the whole of her life. The interests in the fund purported to be conferred by Mrs. Hall's [the donee of the power] will on" her appointees, "must therefore be taken to be interests created by

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the will of James Powell [the father and donor of the power]. Hence the rule against perpetuities must apply to this case, and the gift over by the donee was held void for remoteness. In *D'Abbadie* v. *Bizoin*, Ir. R. 5 Eq. 205, at page 210, the same line of reasoning appears to be followed. It is said at page 210, in commenting upon the will of a donee in execution of a power created by will: "The limitations subsequent to the life estate . . . are given in language which does not render it necessary that, if they had been inserted in the will which created the power, they should become vested within the limits which the law has prescribed. In my opinion they are, therefore, bad." The opposite view was taken, however, by Chitty, J., in *Rous* v. *Jackson*, 29 Ch. D. 521, and he was followed by North, J., in *In re Flower*, 55 L. J. Ch. 200, and by Vice Chancellor Chatterton in *Stuart* v. *Babington*, 27 L. R. Ir. 551. All these decisions were made by single judges. There is no adjudication by the court of appeal or the House of Lords.

There are several cases in England which hold that where power to appoint to children is conferred by marriage settlements, the appointments are referable for determination as to remoteness to the settlement and not to the will of the donee. Of this kind are *Wollaston* v. *King*, L. R. 8 Eq. 165. *Tredennick* v. *Tredennick*, [1900] 1 Ir. R. 354. *Cooke* v. *Cooke*, 38 Ch. D. 202. See also *Morgan* v. *Gronow*, L. R. 16 Eq. 1. We need not pause to consider whether by analogous reasoning resort should be had for the same purpose to the will of the donor of a power created by will. See in this connection Gray, Rule against Perpetuities, (3d ed.) § 520. In any event there appears to be some uncertainty as to the law of England.

In this country the current of authority is all in one direction, to the effect that the question, whether the rule against perpetuities has been violated, is referable to the time of the creation of the power. *In Matter of Dows*, 167 N. Y. 227, at page 231, it is said: "For the purpose of determining whether the execution of a power is in contravention of the statute of perpetuities, the estate created under such power must be referred back to the instrument granting the power. This is settled law and was so held in *Genet* v. *Hunt*, 113 N. Y. 158. Any other rule would permit the evasion of the statute against perpetuities by the grant of powers." Al-

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though there is a pertinent statute in New York, these cases contain a discussion of the common law as an essential part of the chain of reasoning. This is the law of Maryland as established by a line of decisions the last of which is *Gambrill* v. *Gambrill*, 122 Md. 563, where earlier cases are collected and reviewed. To the same effect are *Brown* v. *Columbia Finance & Trust Co.* 30 Ky. L. R. 110, 114, *Boyd's Estate*, 199 Penn. St. 487, 493. *Lawrence's Estate*, 136 Penn. St. 354, 364, and *Re Phillips*, 28 Ont. L. R. 94.

So far as there are intimations in our decisions, they support the same conclusion. It was said in *Stone* v. *Forbes*, 189 Mass. 163 at page 172: "If the gifts are treated, as they must be, as made in effect by the will of John M. Forbes [the donor] they are not too remote." In *Thompson* v. *Pew*, 214 Mass. 520 at page 523 are these words: "With the exception of a difference in the application of the rule against perpetuities founded upon the fact that the property to be given was to come from her husband and not from her except as the appointor, the testatrix had the same power of testamentary disposition over it as over her own." The view taken by Mr. Gray in his work on the Rule against Perpetuities, (3d ed.) §§ 514, 515, 521 to 526*a* is in harmony with *In re Powell's Trusts*, 39 L. J. Ch. 188, and the American decisions, and adverse to *Rous* v. *Jackson*, and the two other English cases following it hereinbefore cited. It is stated with clearness and the reasoning somewhat amplified in an article by him in 26 Harvard Law Review, 720. The opposite view is put forward with acuteness in 26 Harvard Law Review, 64, and 27 Harvard Law Review, 705.

The nature of the power created by will and conferred upon a donee to appoint property by will has been considered by this court in several different aspects. In *Crawford* v. *Langmaid*, 171 Mass. 309, the effort was made to treat the right to exercise such a power as property under the reach and apply statute. See R. L. c. 159, § 3, cl. 7. But it was held that although, if the power was exercised, the property appointed is deemed assets of the estate of the donee so as to be subject to his debts if needed, *Clapp* v. *Ingraham*, 126 Mass. 200, yet, since the nature of the estate of the remaindermen, in case the property is given over in default of appointment, is not affected until the power is exercised, there was no property right in the donee of the power. The rights of creditors again were considered in *Shattuck* v. *Burrage*, 229 Mass. 448.

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There the donee of the power had made the appointment by his will and the question was whether such property could under the circumstances there disclosed be treated as "new assets" of his estate under R. L. c. 141, §§ 11, 18. It was said at page 451: "When a donor gives to another power of appointment over property, the donee of the power does not thereby become the owner of the property. The donee has no title whatever to the property. The power is simply a delegation to the donee of authority to act for the donor in the disposition of the latter's property. The appointee named by exercise of this delegated authority takes as recipient of the bounty of the donor and not as legatee of the donee." It was held in *Sewall* v. *Wilmer*, 132 Mass. 131, that the effect and validity of the instrument whereby the appointment was exercised was to be determined according to the law of the domicil of the donor and not of the donee. It there was said, page 136, "the property of which Mrs. Wilmer has a power of appointment is not her property, but the property of her father; and the instrument executed by her takes effect, not as a disposition of her own property, but as an appointment of property of her father under the power conferred upon her by his will. The domicil of the testator whose property is in question is therefore the domicil of her father." The question has arisen in reference to taxation. In *Emmons* v. *Shaw*, 171 Mass. 410, the point presented was whether, under the collateral inheritance tax law, the appointed property was to be regarded as that of the testamentary donor or of the donee. After a review of the authorities it was held that it passed as under the will of the donor and not of the donee. It there was said, page 412, "Generally speaking, what is done under a power of appointment is to be referred to the instrument by which the power is created, and operates as a disposition of the estate of the donor. [Citing a large number of authorities.] This is the ancient and established rule." In *Walker* v. *Treasurer & Receiver General*, 221 Mass. 600, are these words at page 602: "The power is a deputation of the donee to act for the donor in disposing of the donor's property. Personal property over which one has the power of appointment is not the property of the donee, but of the donor of the power." Again, in *Hill* v. *Treasurer & Receiver General*, 229 Mass. 474, the question arose whether, when the power of appointment had been exercised and the

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property was seized by equity and applied to the payment of the debts of the donee of the power because otherwise they would have gone unpaid, the property so seized was subject to the inheritance tax as property passing under the will of the donee. In holding that it did not so pass, it was said: "It is settled that, the donee having exercised the power, the property appointed becomes in equity assets of his estate, so far as needed to pay his debts, to the exclusion of the persons appointed. . . . The property, however, was the property of the donor of the power. The donee had no title to it. He simply had the privilege, if he chose to exercise it, of disposing by will of property of the donor. He was the deputy of the donor in disposing of the latter's property. This was decided before the enactment of the succession tax law. Therefore, it was inevitable that it should be held in the application of the succession tax law that the assessment should be levied upon the theory that the property appointed was that of the donor, and not of the donee of the power." To the same effect are *Drake* v. *Attorney General*, 10 Cl. & Fin. 257, and *Commissioner of Stamp Duties* v. *Stephen*, [1904] A. C. 137, 140.

The nature of the estate created was discussed in *Hooper* v. *Hooper*, 203 Mass. 50, 58, and it there was said: "It is to be noted that the donee of the power is not the owner of the estate. The interest of the appointee as finally determined is founded upon the deed of the donor." This statement was quoted with approval in *Harmon* v. *Weston*, 215 Mass. 242, 249, where it further was said: "It is from the donor of the power that the property comes to him who takes it, either through the exercise of that power by its donee or by reason of the latter's failure to exercise it." *O'Grady* v. *Wilmot*, [1916] 2 A. C. 231.

This review of our decisions demonstrates that in all other aspects where the question has arisen, the property appointed is regarded as the property of the donor and is treated as passing under his will, manifested by the words employed by the person upon whom he has conferred the power to express his testamentary design in specified particulars.

It seems difficult to say, in view of the reasoning upon which these decisions rest, that, when the rule against perpetuities is to be applied, the ground is to be shifted and the property is to be regarded as that of the donee and disposed of by his will.

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There are numerous serious and well recognized limitations upon the interests of the donee of a power in the property over which he has the power of appointment. Allusion already has been made to some of these. His interest is far from an absolute one. No one can be an owner unless he can sell his property at will. Although a life tenant with power to appoint by will, failing which remainder goes to his children, enjoys many of the incidents of ownership, he lacks the fundamental one of power to sell a fee. Even though he has the power to appoint to his own estate, that does not go far enough. The liability of appointed property to debts of the appointer in case his own estate is insufficient is not an incident of ownership, but arises from a doctrine of equity. See, in this connection, *Tuell* v. *Hurley*, 206 Mass. 65, 68; and *Vinton* v. *Pratt*, 228 Mass. 468, 470. The life tenant who has an absolute power of appointment both by deed or by will may stand upon a different footing. But the donee of a power to appoint by will alone does not act as an owner of the appointed property. As was said by Chief Justice Baldwin in *Bartlett* v. *Sears*, 81 Conn. 34, 44: "One to whom a power of appointment is given by will stands to the testator substantially in the position of an agent toward his principal. An agent cannot do that which the principal cannot do." The essential nature of his act in exercising the power is that he is speaking for the original testator in directing the devolution of the property of the latter. The nature of his power is to express by his own will a disposition of the property of the donor who by the terms of his will adopted in advance these subsequently written words of the donee as disclosing his ultimate testamentary purpose.

Although there are instances of a complete new title springing into existence, as for example by the exercise of eminent domain or the sale of property to satisfy the lien for taxes, title arising from the exercise of a power is simply the transmission of an old title by virtue of the will of the donor of the power given momentarily a new manifestation through the phrase uttered by the donee of the power. Although the power of appointment by will may be unlimited, the title springs from the will of the donor and not from that of the donee. Different considerations might apply if the power was not only general but also capable of being exercised by deed and thus an absolute title be vested in the donee

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during life. The making of a deed to the donee himself in exercise of his power might in that case be regarded as a vain form. But that is not the case at bar.

The donee in exercising the power is in effect writing the will of the donor respecting the appointed property. The donee in doing this in reason is bound by the same limitations of the law as bound the original testator. The donee can take advantage of facts of which the donor was ignorant because they were not in existence when he made his will. But the donee cannot free himself from the rules of law which limited the power of the donor. The will of the donor and that of the donee so far as it exercises the power of the appointment in a sense together constitute the complete testamentary design of the donor respecting the donor's estate. The words used by the donee in exercising the power are to be construed and interpreted as to their meaning in the light of the facts as they are at the time the power is exercised. The will of the donor is projected forward to the time of the exercise of the power so as to receive the benefit of the facts which have appeared since his decease.

The ordinary statement of the rule against perpetuities is simple: "The rule is that executory limitations are void unless they take effect *ex necessitate* and in all possible contingencies within the period of a life or lives in being at the death of the testator and twenty-one years afterwards." *Hall* v. *Hall*, 123 Mass. 120, 124. *Sears* v. *Putnam*, 102 Mass. 5. *Brattle Square Church* v. *Grant*, 3 Gray, 142, 152. *Gray* v. *Whittemore*, 192 Mass. 367, 373. As applied to the exercise of a power of appointment the words of the rule are satisfied if it appears that in the light of facts as to relationship and longevity existent when the appointment is exercised, the estates created in truth will vest and take effect within the period limited by the rule, although this may not have been certain at the death of the donor of the power. Gray, Rule against Perpetuities, (3d ed.) §§ 523, 524. *Hooper* v. *Hooper*, 203 Mass. 50, 61.

There are strong practical considerations to the same end. As is pointed out by Mr. Gray in § 514 of his book already cited, unless the remoteness of an appointment depends on its distance from the creation and not from the exercise of the power "estates for life with powers of appointment by will might be created;

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the tenants for life might appoint for life, with powers to the appointees to appoint by will; these appointees might, in their turn, appoint in like manner, and so an indefinite series of life estates might be created."

Both on principle and on authority our conclusion is that the remoteness of an appointment, made in the exercise of a power to appoint by will alone, so far as affected by the rule against perpetuities must be measured from the time of the creation and not the exercise of the power.

These are the particular facts of the case at bar to which these principles must be applied: Hannah F. Lee, a resident of Boston, died in 1865 and by her will created a trust to pay the income to her granddaughter, Julia Bryant, a minor, then unmarried, during her life, "and on her death to transfer and convey the same in fee to such persons and on such terms as said Julia by her last Will and Testament, executed after her majority, may direct and appoint, and in default of such Will . . . then to her issue, if any, surviving her." Julia Bryant in March, 1867, married Charles J. Paine, born in 1833, had four sons and three daughters, and died in September, 1901, leaving her husband and all her children surviving. Her son Sumner died in 1904, leaving a widow, Salome B., but no issue, and an adopted daughter, Margaret. The husband, Charles J. Paine, died in 1916. Mrs. Paine left a will wherein she exercised the power of appointment given by Mrs. Lee. But she left a large estate of her own and in her will made no distinction between her own and the property appointed.

Treating first the will of Mrs. Paine as relating solely to the appointed property, some of its provisions would not be too remote and others would be too remote under the rule against perpetuities. By her will she gave $525,000 to trustees to pay the income to her husband during his life and after his death "to hold the same for the benefit of my children." With respect to this fund at the termination of the interest of the husband, Mrs. Paine made different dispositions for the benefit of her several children. It is necessary in this connection to consider only the provisions for the benefit of her sons. The provision for the benefit of three of her sons, excluding a fourth son, Sumner, was that each should receive an equal proportionate share in the income after the death of their father "until he shall have attained

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the age of twenty five years, and on his attaining the age of twenty five years, to transfer and convey his equal and proportionate share of the trust fund to such son in fee, free of these trusts." Since each of these sons was old enough at the decease of his mother to be certain to reach the age of twenty-five years within twenty-one years thereafter and, if not before, within twenty-one years from the death of Charles J. Paine, the life tenant, both lives in being at the death of the donor of the power, Mrs. Lee, and they have now reached that age, the appointment to them was good and the share of each has become vested. The final residue of the estate being left upon the same trusts, the share of it given to these three sons, for the same reasons has become vested.

The provision for the son Sumner was in substance that after the death of the husband one equal and proportionate share of the estate, being in fact $75,000, be set apart as a separate fund, the income thereof to be paid to him during his life and at his decease the income of $25,000 of the fund to be paid to his adopted daughter Margaret and the remainder be paid to the issue, if any, of Sumner then living and in default of issue to add to the shares of the other children. The gift of income to Sumner and to his adopted daughter Margaret was vested, although the enjoyment of the latter was postponed until his decease. This appointment was good, since the rule against perpetuities does not apply to such vested interests. *Seaver* v. *Fitzgerald*, 141 Mass. 401. *Gray* v. *Whittemore*, 192 Mass. 367, 374. The gift over of the remainder of the share set apart for Sumner was void for remoteness. He had no issue. It was not certain that he might not live until more than twenty-one years after the decease of both his father and his mother, and then leave issue. *Hills* v. *Simonds*, 125 Mass. 536, 539. *Stone* v. *Bradlee*, 183 Mass. 165, 171.

Numerous pecuniary legacies are given outright, without being deferred as to payment or enjoyment and free from any trust, by clauses Third to Thirteenth both inclusive. Plainly these can be upheld as appointments under the power.

An annuity was given to Mrs. Koopman with a power to appoint by will the sum of three thousand dollars. Manifestly this sum of three thousand dollars might not vest within the required period from the decease of Mrs. Lee.

It is clear, however, from the statement of the amount of

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property to be appointed and the amount of Mrs. Paine's own estate, that the gifts to the three sons, excluding Sumner, which are not void, and the pecuniary legacies given by clauses Third to Thirteenth of the will of Mrs. Paine, both inclusive, which validly can be made out of the property to be appointed, will exhaust or more than exhaust that property. It was the obvious intent of Mrs. Paine that there should be no intestacy either as to the appointed property or her own estate. It is the fundamental rule in the interpretation of wills that the purpose of the testator shall be effectuated unless contrary to some positive rule of law. Where the testator deals with goods and estates, including those over which he has a power of appointment as well as those which belong to himself, as one mass, and clearly expresses a design that there shall be no intestacy as to any part, as matter of construction that testamentary purpose should be executed by applying those portions of the will, which can operate according to the rules of law upon the property to be appointed, as disposing of that property and the other provisions of the will as disposing of his own property. *Stone* v. *Forbes*, 189 Mass. 163, 170. Following this rule of construction there will be no intestate property either of her own or of that over which she has power of appointment, and all the provisions of the will of Mrs. Paine can be carried into effect. It is unnecessary to determine whether the same result could be reached by the operation of the doctrine of marshalling of assets, *Carter* v. *Tanners Leather Co.* 196 Mass. 163, 166, *Tod* v. *Mitchell*, 228 Mass. 541, or the doctrine of election, *Watson* v. *Watson*, 128 Mass. 152, *Noyes* v. *Noyes*, 224 Mass. 125, 134, *In re Bradshaw*, [1902] 1 Ch. 436, 447.

The provision of the residuary clause to the effect that the residuum shall be held by the trustees "on the same trusts and for the same purposes as are set forth in the second clause of this Will," as matter of construction does not give the income of a second $25,000 to Margaret, the daughter of Sumner. It seems clear from the terms of clause second that the total benefaction to her was intended to be limited to the income of that sum.

Decree accordingly.

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REAL PROPERTY COMPANY, INCORPORATED, vs. ELIJAH J. PITT & another.

Suffolk. March 8, 1918. — June 25, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Municipal Court of the City of Boston, Appellate Division. *Practice, Civil*, Appeal. *Words*, "Final decision."

The "final decision of the Appellate Division" of the Muncipal Court of the City of Boston from which by St. 1912, c. 649, § 9, a right to appeal directly to this court is given, means a decision which terminates litigation on the merits of the controversy, directs what judgment shall be entered and leaves nothing to the judicial discretion of the trial court.

A decision of the Appellate Division of the Municipal Court of the City of Boston ordering a new trial of an action is not a decision from which an appeal lies directly to this court.

CONTRACT upon an account annexed for a commission as broker for procuring a customer for a loan. Writ in the Municipal Court of the City of Boston dated March 19, 1917.

The judge of the Municipal Court found for the plaintiff and reported the case to the Appellate Division for determination of the correctness of the refusal by him to make certain rulings requested by the defendant. The Appellate Division made what is termed in the record a "Final Order," ordering a new trial. From this order the plaintiff claimed an appeal.

J. P. Barlow, for the plaintiff.

M. Katzeff, for the defendants, submitted the case without argument or brief.

RUGG, C. J. This action of contract was commenced in the Municipal Court of the City of Boston. The judge of first instance denied certain requests for rulings of law presented by the defendant, and found for the plaintiff. The defendant being aggrieved, the case was reported at his request to the Appellate Division, whose decision was "New trial ordered." Thereupon the plaintiff appealed.

A preliminary question is whether the case had reached a stage where an appeal could be taken.

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The right to appeal directly to this court from the Appellate Division is created by St. 1912, c. 649, § 9. By its terms such appeal lies only "from the final decision of the Appellate Division." It becomes necessary to define the words "final decision" in this connection.

The natural import of that expression is a determination which puts an end to litigation. A "final decision" by the ordinary and approved usage of the language as applied to an action at law means a decision which leaves nothing more open to dispute and which sets controversy at rest. It seems plain that the general court used the words in that sense in this statute. Parties litigant have never been given the right to enter in this court exceptions or appeals relating to interlocutory matters until the case is ripe for final disposition in the court where it is pending. See *Weil* v. *Boston Elevated Railway*, 216 Mass. 545, where the cases are reviewed. The only way in which such matters can be brought from the Superior Court to this court at any earlier time is by comparatively recent statutes which require a certificate by the judge in substance to the effect that he is of opinion that the matter so affects the merits of the controversy that it ought in justice to be determined by the full court before further proceedings are had. R. L. c. 159, § 27; c. 173, § 105. St. 1910, c. 555, § 5. See St. 1917, c. 345. *John Hetherington & Sons, Ltd.* v. *William Firth Co.* 212 Mass. 257. This is very far from permitting a general right of presenting all interlocutory rulings of law which are not decisive of the merits of the litigation to this court for revision. Manifestly such a right might easily become an intolerable burden in affording opportunity for delay and expense, as well as perhaps in other respects.

It cannot be presumed that it was the legislative purpose to confer appeal from the Appellate Division upon a far broader range of matters than is allowed as of right to litigants in the Superior Court.

The provision of the statute in this respect is similar to those of the judicature acts of Congress which permit appeals and writs of error to the Supreme Court of the United States from final judgments or decrees. "Final" in that connection always has been interpreted to mean such a decision as puts an end to the litigation between the parties so that, if there should be an affirmance,

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"the court below would have nothing to do but to execute the judgment or decree it had already rendered. . . . If the judgment is not one which disposes of the whole case on its merits, it is not final. Consequently it has been uniformly held that a judgment of reversal with leave for further proceedings in the court below cannot be brought here on writ of error." *Bostwick* v. *Brinkerhoff*, 106 U. S. 3, 4. *Macfarland* v. *Byrnes*, 187 U. S. 246. *Rio Grande Western Railway* v. *Stringham*, 239 U. S. 44, 47. Opinion by Lurton, Circuit Judge in *Maas* v. *Lonstorf*, 91 C. C. A. 627. See *Cassatt* v. *Mitchell Coal & Coke Co.* 81 C. C. A. 80, for a review of cases.

The words "final decision" in this statute are not rationally susceptible of meaning any decision made by the Appellate Division which is final so far as concerns its action upon the record before it, but which is not final as to the merits of the controversy. The finality of the decision, which is the foundation of an appeal to this court, does not relate to the determination of the Appellate Division upon a particular aspect of the case presented to it, but to its effect upon the issues raised in the case. The test of the finality of a decision is whether it terminates the litigation on its merits, directs what judgment shall be entered, and leaves nothing to the judicial discretion of the trial court, and not whether it is the last word of the Appellate Division on the particular aspect of the litigation at the moment pending before it, directing additional proceedings before the trial judge in order that a final conclusion may thereafter be reached.

The statute now under consideration was the first permitting questions of law to be presented to the full court from any other than the supreme judicial, superior and land courts. It was legislation experimental in its nature. The Municipal Court of the City of Boston is the only one of the police, district or municipal courts which has an Appellate Division and from which questions of law can come directly to this court. There is no similar practice with reference to probate courts, although they now are courts of superior and general jurisdiction with reference to matters within their field. It hardly can be thought that such a general right of appeal was intended to have been conferred under these circumstances. Although the statute appears to have worked well, a different result might follow if it were given a great breadth

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of interpretation in this regard. It is too plain for discussion that it is in the interests of speedy and just determination of controversies that parties should not have the right to come to the full court except for the purpose of settling doubtful questions of law which are likely to be final and decisive respecting the particular cause. Such a purpose could not be imputed to the Legislature in the absence of explicit words.

This interpretation of the statute cannot deprive any party of his rights. If it should happen that the decision of the judge of first instance is right, and that of the Appellate Division wrong in sending the case back for further trial, it would be simple to present the questions of law in such form that no substantial right would be affected.

Hitherto these words of the statute have not been interpreted. The point was not considered in *Wright* v. *Graustein*, 229 Mass. 68, or *Nathan* v. *Boston Elevated Railway*, 229 Mass. 62. Those decisions not being directed to this question, are not authorities respecting it.

It follows that the decision in the case at bar, from which the appeal was taken, was not a "final decision" from which alone appeal lies to this court; and without making any intimation as to the correctness of the ruling made, the entry must be

Appeal dismissed.

ROBERT C. ORPIN *vs.* JAMES G. MORRISON & others.

Middlesex. March 15, 1918. — June 25, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Practice, Civil, Exceptions. *Land Court*, Exceptions. *Way*, Private, Of necessity. *Evidence*, Admitted without objection, Presumptions and burden of proof.

Where, at the hearing of a petition for the registration of the title to certain land, the existence of a way by necessity is an issue, if certain evidence is admitted unqualifiedly and without any objection or exception, to the effect that a predecessor in title of the petitioner, when conveying the locus to another, it comprising only a portion of a parcel of land owned by him, stated to the grantee that he did so with the understanding that the grantee would use, to reach a public way otherwise inaccessible excepting over the remaining land of the grantor, a way across

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land then owned by the grantee's wife, and no motion is made either to strike out or to limit the use of the evidence, the trial judge must give such evidence its proper probative force and its admissibility cannot be considered by this court.

Where, at the close of all the evidence at the hearing of the petition above described, the judge ruled that the evidence described was competent and an exception was taken, such ruling and exception do not bring to this court the question of the admissibility or competency of the evidence.

The presumption that, where the owner of a tract of land conveys to another a part of it from which no right of way to a public way exists unless there be one over land of the grantor, such a way over the grantor's land is intended to be and is included in the grant, may be rebutted by evidence tending to show that the grantor's intention, understood by the grantee, was that there should be no such way over his remaining land but that the grantee should use a way over land then owned and occupied by the grantee's wife.

PETITION, filed in the Land Court on October 28, 1910, for the registration of certain land in Medford, the petitioner claiming rights of way as described in the opinion.

In the Land Court the petition was heard by *Davis*, J., who found that the petitioner had neither of the rights of way claimed by him. The petitioner alleged exceptions.

J. H. Morson, (*R. C. Orpin* with him,) for the petitioner.

T. W. Proctor, for the respondents Morrison and Berry.

F. J. Maloney, for the respondent Twombly, submitted a brief.

RUGG, C. J. This is a petition for the registration of title to a tract of land in Medford containing about a quarter of an acre. It hereafter is referred to as the lot. It is surrounded by land owned by others, and does not abut on any public or private way. There is no easement of access to it from any public or private way discoverable on the records. The petitioner contends that there is appurtenant to it (1) a right of way over land of the respondent Twombly, or failing in that, (2) an easement of necessity over land of the respondents Morrison and Berry. The westerly boundary of the lot is about four hundred feet easterly from Fulton Street, a public way, from which it is separated by land of the respondents Morrison and Berry. The easterly boundary of the lot is distant about two hundred and twenty-two feet westerly from Fellsway West, another public way, from which it is separated in part by land of the respondent Twombly. In 1893, the lot and the land now owned by Morrison and Berry were owned by George G. Fifield as one tract. In that year he conveyed the lot to James H. Fitzpatrick by warranty deed free from incumbrances.

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The petitioner has become owner of the lot through a tax deed. Fifield conveyed the remainder of his tract to Morrison and Berry in 1902 by warranty deed free from incumbrances except certain mortgages and taxes. James H. Fitzpatrick, at the time of his purchase of the lot in 1893, lived with his wife upon the land now owned by Twombly but then owned by her, there being upon it a dwelling house and barn. At that time a driveway led from Fellsway West to the rear of that land, and was separated from the lot only by an old wall and fence. The judge of the Land Court found that Fitzpatrick then took down a portion of the wall and fence between the lot and the driveway and cultivated his land, obtaining access through the driveway belonging to his wife. Twombly has acquired title to the land formerly of Mrs. Fitzpatrick through the foreclosure of a mortgage.

A witness called by Morrison and Berry testified without objection or exception that he was present at the conversation between Fifield and Fitzpatrick at the time of the purchase of the lot, that the latter offered $100 for the lot and would not give any more, and that Fifield replied that he could have it provided "he would use his right of way on his place," meaning that of Mrs. Fitzpatrick, and that "under no other condition would he [Fifield] sell it for a hundred dollars," and that the lot was sold "cheap" for that reason, and that Fifield claimed no right of way over the land or driveway of Mrs. Fitzpatrick.

The main question argued by the petitioner is whether the testimony as to the conversation between Fifield and Fitzpatrick, to the effect that no right of way over other land of the former should attach to the lot conveyed to the latter, was competent. That question, however, is not open to the petitioner. The testimony was admitted without objection. No motion was made to strike it out or to narrow its force to the single point to which, as is now argued by the petitioner, it was competent. *Produce Exchange Trust Co.* v. *Bieberbach*, 176 Mass. 577, 581. The judge did not undertake on his own account to order the evidence stricken out. It was not admitted *de bene*. *Clarke* v. *Fall River*, 219 Mass. 580, 586. Ruling upon the competency was not postponed by the judge until a future stage of the trial. *N. J. Magnan Co.* v. *Fuller*, 222 Mass. 530, 535. The testimony was received in evidence unqualifiedly, without reservation or exception. It is not

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necessary to consider whether, if by accident or mistake no exception had been saved, that might be remedied by the court allowing an exception late, because nothing of that sort was attempted. The testimony was in evidence. It was too late then for either party to save an exception respecting its competency. That must be done ordinarily when offered. *Randall* v. *Peerless Motor Car Co.* 212 Mass. 352, 384. *Commonwealth* v. *Johnson,* 199 Mass. 55. Each party had a right then to insist upon its being given its appropriate probative force. It was the duty of the judge to consider it, so far as to him it seemed worthy of belief and pertinent to the issues.

At the close of all the evidence it appears that the judge ruled that the parol evidence that there should be no right of way by necessity was competent, and that the petitioner excepted to that along with other rulings. But that ruling and exception did not affect the evidence nor open anew its competency. The ruling was impertinent to any matter at that time before the court. The testimony, being already in without objection, was entitled to receive whatever may have been its probative effect. No question of law respecting its admissibility is open. *Hubbard* v. *Allyn,* 200 Mass. 166, 171. *Damon* v. *Carrol,* 163 Mass. 404, 408. *Diaz* v. *United States,* 223 U. S. 442, 450. The judge, by undertaking to make a ruling of law touching a matter not then relevant to any question pending before him, cannot lay the foundation for a good exception or give vitality to a thing which has no life. *Boston Bar Association* v. *Casey,* 227 Mass. 46, 51, and cases there collected. It is the plain practice in trials at common law, and in harmony with its spirit as it has been developed, that questions of law as to the admissibility of evidence must be raised as the evidence is presented and not at some later period of the trial at the volition of either party. It is only by adherence to this rule that confusion and jeopardy of fundamental rights of parties can be avoided.

This is not a case where the evidence was offered to control or vary an instrument in writing, as to which see *Glackin* v. *Bennett,* 226 Mass. 316, 320, and cases there collected. The testimony related to the intent of the parties to the deed respecting a way of necessity, which was the very matter in issue. Although ordinarily gathered from circumstances and shown by extrinsic

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evidence, it might be inferred from the direct testimony thus received in evidence without objection.

It follows that each party now may insist upon his rights respecting that evidence, and that the case be decided upon the record as presented. It becomes unnecessary to discuss the admissibility of the evidence, as to which see *Buss* v. *Dyer*, 125 Mass. 287, 291; *Leonard* v. *Leonard*, 2 Allen, 543, 545; *Cook* v. *Babcock*, 7 Cush. 526; *Simanovich* v. *Wood*, 145 Mass. 180; *Lebus* v. *Boston*, 107 Ky. 98; *S. C.* 47 L. R. A. 79.

A right of way of necessity over land of the grantor is implied by the law as a part of the grant when the granted premises are otherwise inaccessible, because that is presumed to be the intent of the parties. The way is created not by the necessity of the grantee but as a deduction as to the intention of the parties from the instrument of grant, the circumstances under which it was executed and all the material conditions known to the parties at the time. The rule has its basis in a construction of the deed with reference to all the facts within the knowledge of the parties respecting the subject of the grant, to the end that their assumed design may be carried into effect. It is founded on the idea that it is the purpose of the parties that the conveyance shall be beneficial to the grantee. "It is not the necessity which creates the right of way, but the fair construction of the act of the parties." "Necessity is only a circumstance resorted to for the purpose of showing the intent of the parties." *Nichols* v. *Luce*, 24 Pick. 102, 103, 104. *Gorton-Pew Fisheries Co.* v. *Tolman*, 210 Mass. 402, 411. *Richards* v. *Attleborough Branch Railroad*, 153 Mass. 120, 122. It is, however, a pure presumption raised by the law. The right of way does not pass as appurtenant, because there can be no way appurtenant to one part of an entire tract over another part of the same tract when the whole parcel is in single ownership in fee. It is a strong thing to raise a presumption of a grant in addition to the premises described in the absence of anything to that effect in the express words of the deed. Such a presumption ought to be and is construed with strictness. There is no reason in law or ethics why parties may not convey land without direct means of access, if they desire to do so. When a purchaser has voluntarily purchased land knowing its situation fully and that "he had no access to the back part of it, but over the land of another, it was his own

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folly; and he should not burden another with a way over his land, for his convenience." *Gayetty* v. *Bethune*, 14 Mass. 49, 56.

There are circumstances in the case at bar which apart from the oral testimony give color to the contention that the parties did not intend a right of way by necessity. But, however that may be, the actual intention of the parties as disclosed by the oral testimony makes it plain that there was express understanding that there should be no right of way over other land of the grantor. Hence there is no right of way to the lot over land of Morrison and Berry.

It is manifest that there is no right of way appurtenant to the lot over the land of Twombly. There was no such right of way by grant. No such way has been used in connection with the lot for a sufficient period of time to become established by prescription.

Exceptions overruled.

HALL PUBLISHING COMPANY *vs.* WALDO T. MACLAUGHLIN.

Suffolk. March 20, 1918. — June 25, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Municipal Court of the City of Boston, Appellate Division. *Practice, Civil*, Appeal. *Words*, "Final decision."

At a trial of an action of contract in the Municipal Court of the City of Boston, the trial judge refused to give certain rulings asked for by the plaintiff, found for the defendant and reported the case to the Appellate Division, who made an order, giving the plaintiff leave to amend the declaration within ten days, in which case there should be a new trial upon the declaration as amended, and ordering that otherwise the report should be dismissed. Within the ten days the defendant claimed an appeal. *Held*, that the appeal claimed must be from that part of the order of the Appellate Division which gave the plaintiff leave to amend in ten days and ordered a new trial if the amendment were made.

An order of the Appellate Division of the Municipal Court of the City of Boston upon a report of an action of contract after a finding for the defendant, that the plaintiff be given leave to amend his declaration within ten days and that, if such amendment be made, a new trial shall be had, but that otherwise the report shall be dismissed, is not within the ten days a "final decision" of the Appellate Division from which only, under St. 1912, c. 649, § 9, an appeal will lie to this court; and a claim of an appeal by the defendant within the ten days must be dismissed.

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CONTRACT, with a declaration containing two counts, the second count, upon which only the trial was had, being upon a contract in writing of subscription to a book entitled "History of Aleppo Temple," to be published by the plaintiff. Writ in the Municipal Court of the City of Boston dated January 11, 1917.

The judge of the Municipal Court before whom the action was tried refused certain rulings asked for by the plaintiff, found for the defendant and reported the case to the Appellate Division, who made the following order on October 25, 1917: "The plaintiff is given leave to amend the second count of its declaration, in accordance with opinion filed herewith, within ten days after the entry of this order; if such amendment be made, a new trial is granted upon such amended count, otherwise the report is dismissed."

On November 1, 1917, the defendant filed a claim of appeal from the foregoing order.

E. M. Schwarzenberg, for the defendant.

E. E. Wakefield, Jr., for the plaintiff.

RUGG, C. J. This action at law was commenced in the Municipal Court of the City of Boston. When it came on for trial the judge refused to grant two requests presented by the plaintiff for rulings of law, and found for the defendant. The case was taken to the Appellate Division, which granted leave to the plaintiff to amend its declaration within ten days, otherwise the report was to be dismissed. The defendant claimed an appeal before the expiration of ten days.

The defendant was not aggrieved by so much of the order of the Appellate Division as directed that the report be dismissed if the plaintiff did not avail itself of the privilege granted it to amend the declaration. If the plaintiff does not so amend, then final judgment will be entered in favor of the defendant. Manifestly he could not appeal from a decision in his favor. Although St. 1912, c. 649, § 9, does not expressly confine the right to appeal to this court to parties aggrieved by the decision of the Appellate Division, such limitation is a necessary implication. It is contrary to fundamental principles of the administration of justice that the prevailing party may continue litigation when his opponent abides by an adverse decision.

Therefore, this in substance is an appeal from a decision per-

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mitting a plaintiff to amend the declaration. Ample power is conferred upon courts to grant leave to amend pleadings. Orders allowing such amendments ordinarily rest in sound, judicial discretion and are not subject to review. *Lowrie* v. *Castle*, 225 Mass. 37, 39. *Clark* v. *New England Telephone & Telegraph Co.* 229 Mass. 1, 6.

Moreover, this was not in any aspect a "final decision" of the Appellate Division, from which alone appeal lies. *Real Property Co. Inc.* v. *Pitt, ante*, 526.

Without intimating whether the ruling was right or wrong, the entry must be

Appeal dismissed.

OWEN C. CHARLES, administrator, *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. March 25, 1918. — June 25, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Negligence, In use of highway, Imputed, Causing death, Street railway. *Corporation, Ultra vires. Street Railway. Proximate Cause. Practice, Civil*, Charge to jury, Special questions to jury, Deliberation of jury after separation upon unanswered question. *Jury and Jurors.*

Where, at the trial of an action against a street railway company for causing the death (before the enactment of St. 1914, c. 553) of a woman who was thrown from a carriage upon a public street in a city because the horse drawing the carriage fell into a hole in the street between street car rails which the defendant had undertaken to guard, there was no direct evidence as to the woman's conduct before the accident other than that she was sitting at the left hand side of the carriage beside her husband, who was driving, and there was evidence tending to show that both she and her husband were experienced drivers of horses, that there had been digging in various parts of the street and piles of dirt were about, that there were two watchmen and some lights in the neighborhood of the hole which caused the accident, that the husband was driving in the street car track, the horse trotting at a speed of about five or six miles an hour and that there was no easily visible indication of the excavation between the rails, findings are warranted that both the husband and the wife were in the exercise of due care.

If a city makes an excavation between the rails of a street car track and the street railway corporation undertakes to guard the hole and to prevent travellers from falling into it, the assumption of that duty is not an act by the corporation *ultra vires*.

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If, owing to negligence of the street railway company in performing the duty thus assumed by it, the death of a person is caused, recovery for such causing of death is not limited to the $1,000 allowed by R. L. c. 51, § 17, in an action against a municipality for loss of life caused by a defect in a highway.

At the trial of an action for causing death, the judge in his charge to the jury stated, "if you find upon all the evidence that the intestate's death was hastened by this accident, then the plaintiff has sustained the burden of proving that her death was caused by the accident within the meaning of this statute. If you find that she was confined to her bed and had become weak and enfeebled, and if owing to that weakness and confinement hyperstatic pneumonia developed which caused her death, then you would also be warranted in finding that her death was due to the accident. If you should further find that she had some kidney trouble prior to the accident and that owing to the accident it was aggravated and made acute and that her death was materially hastened by the accident, then you would properly be warranted in finding that her death was caused by the accident." *Held*, that such instructions were not fairly susceptible of the construction that there could be recovery even though the confinement to the bed and consequent weakness were not the result of the accident or their proximate cause, but that the instructions meant that there could be no recovery except for consequences flowing from the fall as their operative cause, which was a correct statement of the law.

The declaration in an action of tort by an administrator contained three counts, one for conscious suffering of the intestate, one for damage to his property and one for causing his death. Special questions were submitted to the jury on a Thursday relating to due care of the plaintiff, negligence of the defendant and damages, it being agreed by counsel that the answers to the questions should be regarded as a sealed verdict in that the formal opening of the verdicts one way or the other might be done when the jury reconvened on the next court day, which was Monday. The jury separated at eleven o'clock at night on Thursday. When court reconvened on Monday, the foreman of the jury announced agreements on the answers to all the questions except one, which related to the damages to be assessed under the count for causing death. From the other answers it appeared that the jury had found that the intestate was in the exercise of due care and that the defendant was negligent. The foreman, in answer to an inquiry by the judge, stated that he thought that an agreement might be reached as to the unanswered question. Upon inquiry, the judge was informed that no member of the panel had talked with anybody in any manner about the case. The judge thereupon ordered the jury to return to their room and consider the unanswered question further. They did so and agreed upon an answer upon which as a basis the judge ordered a finding for the plaintiff upon the appropriate count of the declaration. *Held*, that the action of the judge was not an improper exercise of his discretion.

TORT by the administrator of the estate of Emma M. Charles, with a declaration, as amended, in five counts, only the third, fourth and fifth of which are material. In these counts it was alleged that the defendant undertook for its own purposes and in its own interest to guard properly a hole or trench in Washington

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Street in that part of Boston called Dorchester between its outward bound tracks, and to give proper and sufficient warning and notice of the existence of the hole so that the highway at that place might be reasonably safe for travellers, and that it had failed properly to perform the duty thus assumed, so that the plaintiff's intestate on July 8, 1912, when riding on the highway in a carriage, was thrown to the ground and received injuries which resulted in her death. In the third count the plaintiff claimed damages for conscious suffering, in the fourth damage to the horse and carriage, and in the fifth the statutory penalty for causing the death of the plaintiff's intestate. Writ dated April 9, 1913.

In the Superior Court the case was tried before *Sisk*, J. The material evidence is described in the opinion. At the close of the evidence, the defendant asked for and the judge refused to make rulings, which, so far as material to this action, were as follows:

"6. There is no evidence that Emma M. Charles at the time of this accident was in the exercise of due care, and therefore the verdict of the jury must be for the defendant . . . "

"7. The mere fact that the late Emma M. Charles was sitting in the wagon beside her husband is not evidence of due care on her part."

"9. Under no circumstances can the jury find a verdict against the defendant company for the death of Emma M. Charles in excess of $1,000.

"10. If the jury shall find that the defendant company voluntarily assumed the work of watching the hole in question, which duty primarily rested upon the city, and if the jury shall also find that the defendant company was negligent in the manner in which they attempted to perform this work, the defendant company cannot be held responsible to any greater extent than could the city, had the city been performing the work and been found negligent in the same way."

The judge thereupon submitted to the jury special questions, which, together with the action of the jury thereon and the course of the trial relating thereto, are described in the opinion. Upon the return of the answers to the questions, the judge ordered a verdict for the plaintiff on the third count in the sum of $2,250, on the fourth count in the sum of $150 and on the fifth count in the sum of $3,750. The defendant alleged exceptions.

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E. P. Saltonstall, (*C. W. Blood* with him,) for the defendant.

D. E. Hall, for the plaintiff.

RUGG, C. J. This is an action of tort. The declaration was in five counts, three of which are material, one to recover for the personal injuries, one for the property damage, and one for the penalty for causing the death of the plaintiff's intestate, who was his wife. The plaintiff and his wife were travelling together with their daughter, then about ten years old, on Washington Street in Dorchester, in an open runabout driven by the plaintiff, who was a livery stable keeper, when the horse went into an excavation in the street and the intestate was thrown upon the pavement, receiving injuries as a result of which it might have been found that she died several months later.

There was evidence sufficient to support a finding of due care on the part of the intestate. She was travelling with an experienced horseman in the evening on a city street. Confessedly there had been considerable digging in different parts of the street and there were several piles of dirt. Two watchmen at least were in the neighborhood, whose duty it was to guard the places of danger and to give warning to travellers. There was conflicting testimony as to the number and position of lights in the street. The plaintiff was driving the horse in a street railway track, trotting at an estimated speed of from five to six miles an hour, and there was some evidence tending to show that there was no easily visible indication of the excavation between the rails of the track into which the horse fell. There was no direct testimony as to the conduct of the wife immediately before the accident other than that she was sitting on the left side of the vehicle. That was where she ought to have been sitting. She was herself an experienced driver of horses, she was with her small daughter in a vehicle driven by her husband amid a more or less distracting series of obstructions on a city street at night. The judge instructed the jury that want of due care on the part of the husband would be imputed to the wife. There was positive evidence tending to show that he was in the exercise of due care. The verdict of the jury under such instructions must be taken to establish due care on his part. Such conclusion was not unwarranted. *Hurley* v. *Boston*, 202 Mass. 68. There is nothing in the record which requires the conclusion that she ought as a reasonably careful person to have done

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anything more than trust in silence to the experienced skill of her husband. Further positive acts of care on her part need not be shown, but may be gathered from simple absence of fault under circumstances which fairly exclude the inference of negligence. *Maguire* v. *Fitchburg Railroad*, 146 Mass. 379, 382. *Duggan* v. *Bay State Street Railway*, *ante*, 370. *Shultz* v. *Old Colony Street Railway*, 193 Mass. 309. *Bullard* v. *Boston Elevated Railway*, 226 Mass. 262, 264.

The defendant's liability on the death count was not limited to $1,000. The excavation which caused the injury was made by the city of Boston. But since it extended under the tracks of the defendant, the latter for its convenience in operating its cars maintained a watchman to guard so much of the excavation as was between the rails, and to prevent travellers from falling into it. The city was primarily responsible, having dug the hole in the street. Its liability in case action had been brought against it would have been limited under the statute to $1,000. But liability for causing the death of a human being by negligence under all our statutes is in the nature of a penalty. It varies in amount with different classes of corporations and persons. *Brooks* v. *Fitchburg & Leominster Street Railway*, 200 Mass. 8. The defendant had sufficient interest in the matter of guarding this excavation in connection with the maintenance of its own business of transporting passengers to justify it in assuming the duty of guarding it and protecting the public from its dangers. Such an undertaking was not *ultra vires*. Therefore, for any act of negligence in this regard causing the death of anybody, it was liable to the penalty imposed by the statute upon it for such an offence. It must pay the penalty established by law for its negligence, and is not limited to that which might have been imposed upon the city for its negligence having like result. The case upon this point is governed in principle by *Phinney* v. *Boston Elevated Railway*, 201 Mass. 286.

The jury were instructed that, "if you find upon all the evidence that Mrs. Charles' death was hastened by this accident, then the plaintiff has sustained the burden of proving that her death was caused by the accident within the meaning of this statute. If you find that she was confined to her bed and had become weak and enfeebled, and if owing to that weakness and confinement

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hyperstatic pneumonia developed which caused her death, then you would also be warranted in finding that her death was due to the accident. If you should further find that she had some kidney trouble prior to the accident and that owing to the accident it was aggravated and made acute and that her death was materially hastened by the accident, then you would properly be warranted in finding that her death was caused by the accident." This instruction is not fairly susceptible of the construction that there could be recovery even though the confinement to the bed and consequent weakness were not the result of the accident as their proximate cause. Taken as a whole it means that there could be no recovery except for consequences flowing from the fall as their operative cause. The instruction was in accordance with *Wiemert* v. *Boston Elevated Railway*, 216 Mass. 598, and *Larson* v. *Boston Elevated Railway*, 212 Mass. 262.

The case at bar was tried with two other actions, one by the husband as the next friend of his daughter, and one by himself in his own right, to recover for injuries and loss arising from the same accident. The judge did not submit the cases for general verdicts, but by agreement of counsel asked the jury to answer eight questions. Seven of these related (1) to the due care of the husband and (2) of the daughter, (3) to the negligence of the servants of the defendant, (4) the consequential damages of the husband and father for expenses for the sickness of his wife and daughter, (5) the damages of the daughter, (6) the conscious suffering of the wife, (7) the damages to the horse and wagon (which were the property of the wife). The eighth question was in these words: "If the plaintiff, Owen C. Charles, as Administrator, is entitled to recover for the death of Mrs. Charles, what sum is he entitled to recover for her death?"

The jury retired for consideration of the cases, on Thursday, the eleventh day of October, it being agreed by counsel that "the answers to the questions may be regarded as a sealed verdict in that the formal ordering of the verdicts one way or the other may be done when the jury reconvene on Monday morning." The next court day was Monday, October 15. The jury separated at eleven o'clock on Thursday night, presumably by order of the judge, though his directions upon that point are not disclosed. When the court reconvened on the following Monday, the foreman

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of the jury announced that they had agreed on the answers to all the questions except number 8. Thereupon, in response to the inquiry by the judge whether there was any prospect of agreement if the case was further submitted, the foreman replied, "I think there is a chance of reaching an agreement. We are pretty close together as it is, very close, in fact." The defendant seasonably excepted to every step of this proceeding and contended that there had been a disagreement. The judge then sent the jury out to ascertain and report whether any member of the panel had talked with anybody and presently was assured by them in open court that every juryman stated that he had not talked in any manner with anybody about the case. The jury thereupon were sent out for further consideration of the eighth question, and subsequently returned an answer assessing damages. The judge then ordered verdicts to be returned upon each of the three counts in the declaration in accordance with the answers.

The charge of the judge on the question of due care is set out in full. No distinction was made as to the degree, kind or extent of proof of due care requisite for recovery upon the counts for conscious suffering and for death, and no exception was taken in this respect. Doubtless no such distinction was required under the circumstances. See *Hudson* v. *Lynn & Boston Railroad*, 185 Mass. 510, 521. Therefore, when the jury had answered that servants of the defendant were negligent and that the plaintiff was entitled to recover a sum for the conscious suffering of the wife, every element necessary to require them, under the charge of the judge, to assess damages for her death had been found by the jury, and the only thing which they had not found was the amount of damages or penalty.

But it was inevitable that some damages or penalty must be found, or their answers would be inconsistent. It was said in *Mason* v. *Massa*, 122 Mass. 477 at page 480, "It is a well settled and long established practice that a jury, when they have returned a finding that is incomplete and defective, may be sent out again in order to correct the error, even though they had separated after their first finding before they came into court. *Pritchard* v. *Hennessey*, 1 Gray, 294. *Commonwealth* v. *Carrington*, 116 Mass. 37. After a general finding for the plaintiff without an assessment of damages, they may be sent out again for the purpose of

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making such assessment. And this may be done although there may have been an adjournment of the court in the meantine. *Chapman* v. *Coffin*, 14 Gray, 454. *Winslow* v. *Draper*, 8 Pick. 170. *Lawrence* v. *Stearns*, 11 Pick. 501." Further consideration by a jury after a separation following the committal of a case to them is not necessarily fatal. Where it is apparent that they have or may have proceeded upon a misconception of the principles of law laid down for their guidance, the safe and proper course is for the court to instruct them again as to the law and request them to deliberate further. *Kenney* v. *Habich*, 137 Mass. 421, 423. It was said by Chief Justice Gray in *Commonwealth* v. *Tobin*, 125 Mass. 203 at page 206, as to the practice in civil cases when the jury have been permitted to separate after agreeing upon and sealing up a verdict: "If the written verdict does not pass upon the whole case, or the jury refuse to affirm it, the court may send them out again, and a fuller or different verdict afterwards returned will be good." In *Pritchard* v. *Hennessey*, 1 Gray, 294, 296, occur these words: "The practice of sending out a jury, when they return a verdict that is absurd or defective, has existed more than four hundred years. . . . It is objected by the plaintiff, that the jury could not be sent out in this case, because they had separated, after their first finding, before they came into court. But the cases cited by him do not support this objection; and the contrary appears from the cases of *Edelen* v. *Thompson*, 2 Har. & Gill, 31, *Wolfran* v. *Eyster*, 7 Watts, 38, and *Sutliff* v. *Gilbert*, 8 Ohio, 405, 409. So where a jury separated after having agreed, and afterwards came into court with a sealed verdict, which one of the jurors refused to affirm, the court sent them out, and they agreed on a verdict, which the court refused to set aside. *Bunn* v. *Hoyt*, 3 Johns. 255. *Douglass* v. *Tousey*, 2 Wend. 352." *Chapman* v. *Coffin*, 14 Gray, 454. *Levine* v. *Globe Street Railway*, 177 Mass. 204. *Brown* v. *Dean*, 123 Mass. 254, 267. *Commonwealth* v. *Carrington*, 116 Mass. 37, 39. *Burrill* v. *Phillips*, 1 Gall. 360. *Downer* v. *Baxter*, 30 Vt. 467, 474. *Armleder* v. *Lieberman*, 33 Ohio St. 77. *Nims* v. *Bigelow*, 44 N. H. 376. *Evans* v. *Foss*, 49 N. H. 490. *Produce Exchange Trust Co.* v. *Bieberbach*, 176 Mass. 577, 593–595. *McManus* v. *Thing*, 208 Mass. 55, 59. *Warner* v. *New York Central Railroad*, 52 N. Y. 437, 440. *Hatch* v. *Attrill*, 118 N. Y. 383, 388. See also *Vennard* v. *McConnell*, 11 Allen, 555, 562,

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563, and Co. Lit. 227 b. While the interval between the separation and the reassembling of the jury was longer than has been intimated in some cases was permissible, *Winslow* v. *Draper*, 8 Pick. 170, there appears to be no reason to think that justice has not been done or that the defendant has suffered any prejudice. Great care was taken to be assured that in fact the interests of the parties and of the public to the end that right results be reached had not been jeopardized by anything which had occurred in the interval. The conduct of the judge before directing the jury to consider the question further imports a finding that nothing had occurred during the interval of separation to imperil in the slightest degree the purity and absolute impartiality of the jury. The case at bar comes within the language of Chief Justice Shaw in *Commonwealth* v. *Roby*, 12 Pick. 496, at page 516: "it is not every irregularity which will render the verdict void and warrant setting it aside. This depends upon another and additional consideration, namely, whether the irregularity is of such a nature as to affect the impartiality, purity and regularity of the verdict itself." There is nothing in the point decided in *Spencer* v. *Williams*, 160 Mass. 17, which requires a different result. The same is true of *Commonwealth* v. *Durfee*, 100 Mass. 146, and *Commonwealth* v. *Dorus*, 108 Mass. 488, for the reasons pointed out in *Commonwealth* v. *Tobin*, 125 Mass. 203, at page 206.

Exceptions overruled.

SARAH A. PARSONS *vs.* MAME C. PARSONS, executrix.

Hampshire. March 27, 1918. — June 25, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Deed, Consideration, Validity, Incomplete deed. *Parent and Child. Trust*, Constructive. *Fraud. Equity Pleading and Practice*, Cross bill. *Equity Jurisdiction*, To complete deed by addition of seal.

Where one of several sons, after the death of his father, acts in a confidential and advisory, but not strictly in a fiduciary, relation to his mother, who is the sole beneficiary of his father's will and as such has received property of considerable value, such relationship does not preclude business relations between him and his mother; and, if the mother conveys to such son certain real estate which she

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received under his father's will and which the son forthwith improves by extensive building operations, and, after the death of the son, brings a bill in equity in which she alleges that the conveyance was made to the son for her benefit and seeks a reconveyance and accounting, while careful scrutiny is required under such circumstances to make sure that the transaction was fully understood by the mother as to its direct and remote bearings and was entered into by her with appreciation of its immediate effect and ultimate result and that there was no overreaching and that no unfair advantage was taken of her, when these elements are assured, the transaction stands on the same footing as other business transactions.

A master, to whom the suit above described was referred, found that considerations for the conveyance of the property in question, which at the time of the conveyance was worth from $12,000 to $15,000 and upon which the son at once spent $35,000 in improvements, were an agreement by the son with his mother to carry out an expressed wish of his father to erect such buildings upon the land as he forthwith erected, an agreement to continue the support and maintenance of the mother and such money advancements as might be reasonably necessary for her comfort, that the son kept these agreements to the time of his death and that they still were being carried out by his representatives in a satisfactory manner; and that further considerations were the placing by the son of insurance upon his life in the sum of $6,000, of which $3,000 was paid to the mother at his death, and a wish of the mother to promote the interests of this son, in whose family she lived and who provided liberally for her wants and whom she expected would continue to do so, and thereby to secure to herself added comforts for the future. The master stated that he was unable to determine the money value of the considerations for the deed, but he found that they were substantial and valuable. On an appeal by the plaintiff, after an examination of all the findings of the master and of evidence reported by him, it was *held*, that the findings were warranted, and that the deed was supported by an adequate consideration.

Applying to the facts found by the master the principles of law that the deed from the mother to one of her sons, above described, was not *prima facie* void but that the presumption was in favor of its validity, and that, in order to set it aside, the court must be satisfied that it was not the voluntary act of the mother, it was *held* that there was no sound ground for holding that there was fraud as matter of law in the giving of the deed.

In a suit in equity against the executor of a will to have a deed of the plaintiff to the defendant's testator set aside because it was procured by fraud and undue influence, was voluntary and without consideration and was incomplete in that it bore no seal, it is proper for the defendant to file a cross bill against the plaintiff alleging that the deed was supported by an adequate and valuable consideration, was valid, and that the omission of the seal was due to accident; and, upon findings of a master, warranted by the evidence, sustaining such allegations, a decree may be entered directing that the deed be completed by the affixing of a proper seal.

BILL IN EQUITY, filed in the Superior Court on December 29, 1914, and afterwards amended, by the widow and sole beneficiary under the will of Horace K. Parsons, late of Northampton,

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against the executrix of the will of Charles O. Parsons, a son of Horace K. Parsons, to set aside certain conveyances made by the plaintiff to her son, Charles O. Parsons, and for an accounting, it being alleged among other things that the "Oregon" deed, described in the opinion, was procured by fraud and undue influence, was voluntary and without consideration, and was incomplete because it bore no seal; also a

CROSS BILL IN EQUITY, filed on March 24, 1917, by the defendant against the plaintiff in the suit above described, seeking to have the plaintiff ordered to affix a seal to a deed described in the opinion.

The suit was referred to a master and his findings, set forth in three reports, were confirmed.

The findings of the master as to the circumstances attending the omission of the wafer seal from the "Oregon" deed, referred to in the opinion, were "that the notary inscribed upon said deed what purports to be a seal, namely — the word 'seal' with a scroll about it; that no seal of substance as is required in this Commonwealth was affixed thereto; that the said Sarah A. Parsons signed the instrument in the presence of the notary and acknowledged the same to be her free act and deed before him, he, the said notary, thereupon affixing his signature thereto in his official capacity; that within a short time thereafter Sarah A. Parsons mailed the deed to her son Charles O. Parsons, addressed to Florence, Massachusetts, together with a letter [which the master quoted] . . . that at the time she executed the deed . . . she, was acquainted with and fully understood its contents, that she delivered the same to Charles O. Parsons for good and valuable consideration and for one which was adequate with the intent to convey to said Charles O. Parsons absolutely the property therein described; that she was not induced so to by false or fraudulent representations of said Charles, that the deed was intended to be complete and the omission of a wafer seal from said instrument was due to accident; . . . "

Other material findings are described in the opinion.

The master also, by agreement of the parties and upon an order of the court, reported certain of the evidence before him. The plaintiff filed objections and exceptions to the reports, which were overruled by *Aiken*, C. J., by whose order a

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final decree favorable to the defendant was entered. The plaintiff appealed.

J. W. Mason, for the plaintiff.

J. C. Hammond, for the defendant.

RUGG, C. J. This is a suit in equity whereby the plaintiff sought to set aside several transfers of property made by her to her son Charles, now deceased, of whose will the defendant is executrix and sole beneficiary. Most of the issues originally involved have been settled. The only matter now argued by the plaintiff relates to the validity of a deed of real estate situated in the village of Florence, a part of the city of Northampton. This deed was executed by the plaintiff while in Oregon.

The background for the consideration of that question is that the plaintiff is the widow of Horace K. Parsons, who during his life was a general merchant, postmaster, notary public and man of affairs having the respect and confidence of his neighbors in the village. He died in 1891 leaving a widow and six sons. The oldest son was married and lived in a building on his father's home place. The other five were at home, of whom Charles was the senior. Royal, the next younger, was of age, and the others were aged respectively fifteen, eleven and nine years. Charles had been assistant to his father. He took up the various activities left by his father and carried forward and developed them with energy, progressiveness and success. The father left all his property by will to his widow. A part of his estate was the homestead property, upon which was the home where the family lived, the postoffice, store and other buildings. Charles married, brought his wife to the home, and until he died, maintained there in considerable luxury a common household including his own family, his mother, one of his younger brothers, who there fell sick and died after a long illness, and his other younger brothers until they reached maturity and sought homes for themselves. The mother travelled extensively sometimes with one or more of her younger sons, and the money therefor was furnished largely by Charles. She always and up to the time of the hearings made her home with Charles, and since his decease with his widow. The homestead estate was at the corner of Main and Maple Streets. It had been the cherished idea of the father to build a business block along the Maple Street side of the lot. In furtherance of that idea Charles

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constructed a brick block with two stores at the corner of the streets. This block with the land about the same was conveyed by deed to Charles in 1900. He made improvements in the house in which the family lived. Some years earlier he had taken over all the mercantile business of the father and conducted it in his own name.

It was contended by the plaintiff before the master that she established a trust for her own benefit with Charles as trustee. The master found against her on this issue, and settled their relationship by determining that "Charles O. Parsons received the assets of the mercantile business carried on by Horace K. Parsons during his lifetime, the credits of other property, both real and personal, of Sarah A. Parsons under a mutual agreement, the terms of which were well understood by the parties thereto, namely — that Charles O. Parsons should pay and discharge all obligations of the estate incident to the business so carried on; that he should provide means for the maintenance of the real property of the plaintiff, the support of the household, and assume all pecuniary obligations in reference to the mother to which her husband and his father, Horace K. Parsons, would have been subjected were he living, including her care and maintenance in the Parsons Homestead, both in sickness and in health, and furnishing her with sufficient amount of money from time to time, having regard for her own means, so long as she should live, to enable her to provide for her reasonable additional needs, pleasures and enjoyments. Charles O. Parsons, up to the time of his death, faithfully carried out the obligations to his mother so assumed, and up to said time, she never complained to the contrary or questioned the status or terms of arrangement between them; that such obligations on his part might be fulfilled in the event of his own death, prior to that of his mother, at a later date he caused his life to be insured in the sum of Three Thousand ($3,000) Dollars for her benefit, which amount was paid to her upon his decease."

The particular facts about the deed of the remainder of the homestead estate (outside the corner lot already adverted to) called the "Oregon deed" because executed in that State, are reported by the master as follows: "sometime prior to November 1905, Charles O. Parsons arranged with his mother Sarah A. Parsons to convey for good and valuable consideration and for

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one which was adequate the premises later described in the deed above referred to; that about the first of November, 1905, Mrs. Parsons started on a journey to the Pacific Coast, going directly to Portland, Oregon and remaining there until and after March 7, 1906; that pursuant to the understanding between them, sometime in February, 1906, Charles O. Parsons drew and forwarded to Sarah A. Parsons at Portland, the instrument under discussion; that she received and retained the same in her possession for a week or more, that on March 7, 1906, she in company with friends called upon a notary public in Portland, George B. Buell, for the purpose of executing the deed; that the notary was particular and careful in explaining to her the contents of the instrument and its force and effect; . . . That at the time she executed the deed . . . she was acquainted with and fully understood its contents, that she delivered the same to Charles O. Parsons for good and valuable consideration and for one which was adequate with the intent to convey to said Charles O. Parsons absolutely the property therein described, that she was not induced so to do by false or fraudulent representations of said Charles, . . . that she treated the property described in said deed as belonging to the said Charles down to the time of his death, September 19, 1914. . . . The value of the property conveyed to Charles by the 'Oregon' deed at the time of conveyance was from $12,000 to $15,000 and the improvements made by Charles immediately following the delivery of the deed were in excess of $35,000. . . . Charles O. Parsons stood in a confidential and advisory relation to his mother, but I do not find any general scheme on the part of Charles having for its end the acquirement of as much as possible of her property in order to exclude her remaining issue from inheriting from her, nor do I find the confidence she reposed in him to have been abused or betrayed." "After securing the deed of the remaining part of the Homestead from the mother, Charles forthwith began to make many changes and improvements in the property. The old frame buildings on the Maple Street side were removed to other parts of the lot and remodeled into comfortable dwelling houses. They were replaced with a two story brick business block extending along the entire remaining side of the lot abutting Maple Street, the block being connected with the Post Office Block built in 1900, and both structures forming one

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continuous block, containing nine stores on the ground floor, and large assembly hall and five tenements on the second floor. Funds for the construction of both blocks were supplied by Charles O. Parsons. The cost thereof was not in evidence, but it is the judgment of the Master, made up from a view, that the combined buildings and changes did not cost less than Thirty-Five Thousand ($35,000) Dollars. . . . The two buildings were not built to conform to the boundary lines as determined in the two deeds above referred to, but independently thereof. That is, the two blocks were constructed without reference to the line dividing the properties conveyed to Charles by said two deeds. Sarah A. Parsons gave no direction in reference to the construction of either of the buildings, contributed nothing from funds in her possession to the cost thereof, neither did she make any inquiry as to how funds for the purpose were provided, or where the required funds came from."

The specific finding of the master as to the consideration for this deed is in these words: "(a) The agreement of the son with his mother to carry out the expressed wish of the husband and father, Horace K. Parsons, to have a block of stores built along the entire Maple Street side of the homestead lot, which agreement he kept and in so doing expended a sum in excess of $35,000. (b) The agreement to continue for the mother so long as she might live her support and maintenance and such money advancements as might be reasonably necessary for her comfort having regard to the income from her remaining property, which agreement he faithfully performed to the time of his death and which is now being carried out by his representatives in a manner satisfactory to Sarah A. Parsons. (c) The negotiation by Charles O. Parsons of insurance on his life in favor of the mother to the extent of $6,000, of which $3,000 upon his death was paid to her. (d) The wish of the mother to promote the interests of her son, in whose family she lived and who provided liberally for her wants and whom she expected would continue so to do, and thereby secure to herself added comforts for the future (e) . . . the money value of the consideration for the deed I am unable to determine in dollars but I find the same to have been substantial and valuable."

No error of law is disclosed in these findings. The relation of Charles to his mother was confidential and advisory. It was not

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fiduciary in its strict legal sense. It was not of such nature as to preclude business relations between them. Careful scrutiny is required under these circumstances, to make sure that transactions between the parties are fully understood as to their direct and remote bearings, and are entered into with appreciation of their immediate effect and ultimate result, and that there has been no overreaching and that no unfair advantage has been taken. But when these elements are assured, they stand upon the same footing as other business relations. *Smith* v. *Smith*, 222 Mass. 102, 106, 107. It is not necessary that the consideration be adequate in monetary value. The satisfaction of having executed by her son the cherished design of her husband that a business block be erected upon the homestead lot might none the less contribute a valuable consideration, although it would be of little or no financial value to the plaintiff; and it manifestly imposed a considerable risk, a large expense and much responsibility upon the son Charles to undertake the construction of such a block. There was a direct financial obligation incurred by Charles for the benefit of his mother at about the same time as the delivery of the "Oregon deed," in the procurement of life insurance payable to her in case of his death. It may be inferred that this was a part of the consideration for that deed. It is conceded that she has received $3,000 from this source. The findings of the master fairly construed mean that this was a part of the consideration for the "Oregon deed" and did not relate exclusively to other matters. The renewed and re-enforced agreement on the part of Charles to support the mother and supply such advancements for her comfort as might reasonably be necessary is a circumstance entitled to some weight in this connection. There was also the love and affection which the mother naturally felt for the son, whose successful business habits and methods bore so close a resemblance to those of his father. This naturally kindled the admiration of a discerning mother. It is a factor which ought not to be omitted in weighing the relations of the parties. The reported evidence does not appear to us to conflict with, but on the whole rather to confirm, the facts found and inferences drawn by the master. They cannot be pronounced without adequate support under all the circumstances.

There is nothing in the record which requires a finding that

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Charles did not exercise good faith toward his mother in relation to the "Oregon deed." The finding that there was no fraud practiced by the son upon his mother cannot be declared wrong on this record. In the weighing of evidence upon such an issue much depends upon observation of witnesses and their method of testifying, an advantage which the master had and which is denied to us. That circumstance leads an appellate court to be reluctant in overturning a decision by a master unless required by manifest justice. *Jennings* v. *Demmon*, 194 Mass. 108, 111. *Adamson* v. *Gilliland*, 242 U. S. 350, 353. The principle of law governing cases of this kind was stated by a former chief justice of this court in *Towson* v. *Moore*, 173 U. S. 17, at page 24, in these words: "The principles established by these authorities may be summed up as follows: In the case of a child's gift of its property to a parent, the circumstances attending the transaction should be vigilantly and carefully scrutinized by the court, in order to ascertain whether there has been undue influence in procuring it; but it cannot be deemed *prima facie* void; the presumption is in favor of its validity; and, in order to set it aside, the court must be satisfied that it was not the voluntary act of the donor. The same rule as to the burden of proof applies with equal, if not greater force to the case of a gift from a parent to a child, even if the effect of the gift is to confer upon a child, with whom the parent makes his home and is in peculiarly close relations, a larger share of the parent's estate than will be received by other children or grandchildren." To the same effect are *Mackall* v. *Mackall*, 135 U. S. 167, and *Smith* v. *Smith*, 222 Mass. 102.

Applying these principles to the facts here disclosed, there is no sound ground for holding that there was fraud as matter of law. The son was about to expend $35,000 of his own upon land the title to which stood in his mother's name. The reason for this in part was a desire to effectuate a plan of the father, dear to the hearts of his mother and himself. But it was a business adventure. Whether it should be in the end a failure or a success naturally would depend upon numerous elements more or less uncertain in their nature. All the facts were equally well known to both the mother and son. The latter in addition contemporaneously incurred financial obligations for the direct benefit of the mother. It well might have been inferred that the plaintiff, being

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fully cognizant of the entire situation and having a considerable measure of commercial sagacity, voluntarily executed the deed with a complete realization of its meaning and effect, having deliberately decided that she was quite willing to take in return the several advantages both pecuniary and sentimental which would accrue to her as a result. There is no reason why she should now be aided by the law to bring about a change of purpose after the understanding has been entirely carried out by the son in apparent reliance upon the conveyance.

The master has found that the omission of the wafer seal from the "Oregon deed" was due to accident. This finding cannot be reversed. It appears from the circumstances of its execution, the reported evidence and the other facts found, to be manifestly sound. It was proper for the defendant to file a cross bill asking for specific affirmative relief to the end that the deed be completed by the addition of such a seal as is required by our law. This matter relates to the same general subject as the main bill. *Richards* v. *Todd*, 127 Mass. 167, 170. *Andrews* v. *Gilman*, 122 Mass. 471, 474. *Forbes* v. *Thorpe*, 209 Mass. 570. *Torrey* v. *Parker*, 220 Mass. 520, 525. It having been found that the conveyance made by the "Oregon deed" was upon a valuable and adequate consideration, and there being no ground for disturbing this finding, there is no reason why that deed should not be completed by the addition of a seal. The facts, which have been found, show that this is not a defective attempt to make a gift, but a bargain for a conveyance upon a sufficient consideration, which falls short of accomplishing the result intended by the parties to a valid contract because of an imperfect deed. It is one of the familiar functions of equity to enforce the correction and completion of such an instrument.

Decree affirmed.

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MEYER GOLDMAN *vs.* TAX COMMISSIONER.

Suffolk. April 8, 1918. — June 25, 1918.

Present: RUGG, C. J., LORING, DE COURCY, CROSBY, & PIERCE, JJ.

Tax, On income. *Pawnbroker.*

The interest received by a pawnbroker in the course of his business lawfully may be taxed at the rate of six per cent under St. 1916, c. 269, § 2 (a), imposing a tax at that rate on income from "money at interest" and is not taxable under § 5 (b) of the same chapter, imposing a tax at the rate of one and a half per cent on income "derived from professions, employments, trade or business" and providing that "Interest and dividends taxable under section two of this act shall not be taxed under this section."

PETITION, filed in the Superior Court on January 15, 1918, under St. 1916, c. 269, § 20, appealing from the refusal of the Tax Commissioner to abate an income tax of six per cent assessed on the sum of $871 received by the petitioner during the year 1916 in his business of pawnbroker and dealer in second hand articles carried on by him at his shop on Washington Street in Boston.

The answer of the Tax Commissioner filed by the Attorney General alleged that the petitioner was engaged in the business of lending money as a pawnbroker upon the security of tangible personal property; that in connection with all such loans made by him a ticket in the form annexed to the petition, duly filled out, was issued to the borrower; that the amount of $871, received as alleged in the petition from dealing and trafficking in pledges and carrying on the business of a pawnbroker, consisted entirely of amounts paid to the petitioner as compensation for loans made by him as a pawnbroker, and was the total amount paid to him during the year by customers redeeming pledges in excess of the amounts lent and repaid; that accordingly the amount of $871 described in the petition constituted interest subject to taxation under the provisions of St. 1916, c. 269, § 2, and that the tax described in the petition was assessed in accordance with the provisions of that statute.

The case came on to be heard before *Chase*, J., and, the petitioner agreeing that the allegations of fact contained in the respondent's

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answer were true, and there being thus an agreement as to all material facts, at the request of the parties the judge reported the case for determination by this court without making any decision thereon.

The case was submitted on briefs.

E. N. Hill & J. Nelson, for the petitioner.

H. C. Attwill, Attorney General, *W. H. Hitchcock*, Assistant Attorney General, for the Commonwealth.

LORING, J. The question in this case is whether money received by a pawnbroker by way of interest on loans made by him in the course of his business should be taxed at six per cent under § 2 of the income tax act (St. 1916, c. 269) or at one and one half per cent under § 5 of that act.

The petitioner, who is a pawnbroker and a dealer in second hand articles, received $871 as interest on loans made by him as a pawnbroker. A tax was assessed upon him at the rate of six per cent on the ground that the $871 was received by him as interest from . . . money at interest" within St. 1916, c. 269, § 2 (a). The petition now before us is brought to obtain an abatement of that tax. If the $871 was not taxable under § 2, no tax was due from the petitioner because the net income received by the petitioner from his whole business did not exceed $2,000.

The petitioner's first contention is that, under and by force of the decisions of this court construing the tax acts in force before the enactment of the income tax act here in question, "money at interest" did not include money lent by a pawnbroker in the course of his business and for that reason the same words in St. 1916, c. 269, § 2 (a), do not include money so lent. The second contention of the petitioner is that interest received on money lent by him as a pawnbroker is taxable under § 5 and not under § 2 because it is money "received from dealing and trafficking with tangible personal property" and that the proposition that it is money "received from dealing and trafficking with tangible personal property" was established by the decisions of this court before the income tax act here in question was enacted. Both contentions are based upon the decision made in *Boston Loan Co.* v. *Boston*, 137 Mass. 332. We do not find it necessary to determine how far the conclusion drawn in the petitioner's first contention is or is not correct. The second contention is founded on a mis-

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apprehension of the decision made in *Boston Loan Co.* v. *Boston*, *ubi supra*. What was decided in that case was that a pawnbroker's place of business was a shop within Gen. Sts. c. 11, § 12, cl. 1, because in lending money at interest a pawnbroker carries on the business of trafficking in money and the pledgee's title to tangible personal property acquired by him as security for money so lent is a part of his stock in trade in the same sense that the fixtures at his place of business are a part of his stock in trade and taxable as such in the town where he had his place of business or shop on the first day of May within Gen. Sts. c. 11, § 12, cl. 1. It was not there decided nor does it follow from what was there decided that interest received on loans made by a pawnbroker is not in fact income received from money at interest, much less that such interest could not be treated by the Legislature as such.

There would be great force in the proposition that interest received on loans made by a pawnbroker or (as in the case at bar) by a pawnbroker and dealer in second hand articles in the course of his business as a pawnbroker is income from "professions, employments, trade or business" within § 5 and not income derived by way of "interest from . . . money at interest" within § 2 (a) were it not for the clause at the end of § 5 which provides that "Interest and dividends taxable under section two of this act shall not be taxed under this section."

This clause at the end of § 5 is a direct implication that interest and dividends received as part of an income "derived from professions, employments, trade or business" can be taxed as income under § 2. In other words this clause at the end of § 5 is a direct implication that the tax commissioner can analyze the income "derived from professions, employments, trade or business" and tax at six per cent so much of it as is income within § 2 and the balance of that income "from professions, employments, trade or business" at one and one half per cent.

This consideration is decisive of the question now before us.

It follows that the tax imposed upon the interest amounting to $871 received by the petitioner in the course of his business as a pawnbroker was taxable under St. 1916, c. 269, § 2, and the entry must be

Petition dismissed.

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PUFFER MANUFACTURING COMPANY *vs.* MAGNERE YEAGER & another.

Bristol. May 13, 1918. — June 25, 1918.

Present: RUGG, C. J., LORING, DE COURCY, CROSBY, & PIERCE, JJ.

Custom. Evidence, Of custom, Presumptions and burden of proof. *Contract,* Construction, Incorporation of custom. *Practice, Civil,* Exceptions, Findings by judge.

At the trial of an action for breach of a contract, made by correspondence, whereby the plaintiff agreed to sell and deliver and the defendant agreed to purchase and pay for certain marble to be used for the interior finish of a post office building, the defendant admitted the making of the contract but contended that it was conditional upon the approval, by a supervising architect employed by the national government, of samples submitted by the plaintiff, by reason of a general custom that such contracts relating to the construction of government buildings always were subject to such a condition. It did not appear that the plaintiff had knowledge of any such custom. The defendant offered in evidence his own testimony that such a provision was written into every government contract that he had taken. The evidence was excluded. *Held,* that the exclusion was proper, there being no offer to show that the plaintiff had knowledge of the custom and the evidence not tending to show a custom of such general and universal application that the plaintiff must be presumed to have had knowledge of it.

There was conflicting evidence, at the trial of the action above described, as to whether a written statement of the condition that samples should be approved by the supervising architect was included in a set of plans sent to the plaintiff by the defendant. The judge found for the plaintiff. *Held,* that this finding must mean that the judge found that no such written statement was furnished to the plaintiff and that the plaintiff had no notice of such a custom; and that, upon such findings, a further finding for the plaintiff was warranted.

No exception lies to the refusal of a judge sitting without a jury to make specific findings of fact.

CONTRACT for breach of an alleged agreement, made by correspondence, whereby the plaintiff was to sell and deliver and the defendants were to purchase "American Sienna marble" for use in the interior finish of the post office building at New Bedford. Writ dated July 15, 1915.

In the Superior Court the action was heard by *White,* J., without a jury. The material evidence and the course of the trial are described in the opinion. The judge found for the plaintiff in the

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sum of $2,171.33. The defendants alleged exceptions and also claimed an appeal.

The case was submitted on briefs.

O. S. Cook, M. R. Brownell & F. H. Taber, for the defendants.

I. R. Clark, N. B. Vanderhoof & A. E. Little, for the plaintiff.

PIERCE, J. This is an action of contract to recover damages for the alleged breach of a contract to receive and pay an agreed sum for a certain quantity of finished American Sienna marble.

The defendants, before December 17, 1913, had entered into a "general contract" with the United States for the erection of a post office building at New Bedford, Massachusetts, and were to use Eastman's American Sienna marble for the interior.

On December 17, 1913, the plaintiff wrote to the defendants soliciting the privilege of submitting an estimate for supplying the marble. On December 19, 1913, the defendants replied, "we will be pleased to receive your proposal on the different marbles, as follows: . . . A separate proposal on all marble specified to be of American Sienna." On December 20, 1913, under separate covers, the defendants wrote to the plaintiff and forwarded certain specifications and drawings. The letter requested a return of the drawings and a part of the specifications. On December 26 and 27, 1913, the specifications and drawings were returned as requested.

On January 3, 1914, the plaintiff sent to the defendants "estimates for interior marble in the New Bedford Post Office." These estimates included a separate proposal for American Sienna marble (where specified) $6,473. On January 5, 1914, the defendants, after stating, "we will not be able to consider your proposition as a whole," continued, "Your price on the American Sienna marble is about in line. Please advise us if you would be interested in making a quotation on this part of the work only, and if you can consider an offer of $6,000.00 for this material, cut ready to set, delivered on the cars at New Bedford. If you are, it may be that we can give you this part of the work. Trusting to hear from you promptly, we are . . ."

To this letter, on January 7, 1914, the plaintiff telegraphed the defendants requesting that they "name highest price you will pay for all marble" to be used in the building. On January 8, 1914, in reply, the defendants wrote: ". . . As we advised you in our letter . . . we do not see how you can accept any offer we could

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make you, but on the American Sienna it is different. We have three proposals, all very close to each other. For that reason we made you the offer of $6,000.00 . . . We will say, however, if you are interested in the offer made you for the American Sienna, we would like to have you advise us promptly . . . ."

On January 10, 1914, the plaintiff replied: "We received your reply to our night letter, and beg to thank you for the same. We will accept your proposition to use Eastman's American Sienna marble, in the New Bedford Post Office, so if you will kindly send along the contract in duplicate, we will sign same and return one copy to you . . . ." On January 17, 1914, the defendants wrote to the plaintiff, "This will acknowledge receipt of yours of the 10th inst. advising that you will accept our offer to furnish that part of the marble for the building mentioned above [New Bedford, Mass., P. O.] specified to be of American Sienna, and your request to forward contract. . . . Just as soon as this has been done, and some other matters that require my immediate attention have been attended to, the question of contract will then be taken up. In the meanwhile, please send us by express a sample (about 6″ × 12″) of the Eastman's American Sienna marble on which your proposal is based." The plaintiff complied with the defendants' request for samples, and on January 27, 1914, was notified by the defendant that "in our opinion it will not be satisfactory to the Supervising Architect." On January 29, 1914, the plaintiff wrote to the defendants, "We have notified our plant to send you . . . samples that are more strongly marked than the first one submitted. Hoping one of these samples will prove satisfactory, we are . . ."

On February 9, 1914, the defendants wrote to the plaintiff: "Referring to that part of the marble work for this building for which we have given you the order, we find it will be necessary that you give us certain information before the contract can be prepared. Please advise us as follows: Are you a co-partnership or a corporation? If a co-partnership, give us the names of the different members and their place of residence. If a corporation, under the laws of what State are you incorporated? Just as soon as we have this information, contracts in duplicate will be forwarded you for your signature." On February 11, 1914, the plaintiff replied: " . . . we are a corporation, incorporated under the laws of the State of Maine.

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We note you will forward to us the contract in duplicate, for our part of the work, as soon as you receive this information . . . ."

On February 17, 1914, the defendants wrote to the plaintiff: "Referring to the American Sienna marble required in the construction of the U. S. Post Office, New Bedford, for which you have the contract. . . . Personally, we like it [the sample] very much and are of the opinion it will meet with the approval of the Supervising Architect. In order to expedite matters, we would suggest that you furnish us with two more samples 12″ square, 7/8″ thick. . . ." On February 27, 1914, the defendant wrote, "I am pleased to advise you that the sample of the material met with general approval, but they took exception to the polish." The letter requested two more samples, "that will show the extreme markings and colors of the marble when furnished, and see that they are more polished. As soon as this is done, express them to us here so that we can forward them to the Supervising Architect." On March 4, 1914, the plaintiff sent "samples of American Sienna, showing extremes that are obtainable in the same block, as near as we are able to get it." Letters and telegrams relating to delay in sending additional samples followed. On March 11, 1914, the defendants, referring to the samples sent, wrote: "they have been received and forwarded to the Supervising Architect. Just as soon as we are advised as to his decision, we will in turn advise you."

On March 20, 1914, the plaintiff wrote, "We presume the contracts have slipped your mind, as they have not yet come to hand." On April 15, 1914, the defendants wrote (quoting from a communication from the supervising architect), "No action is taken on American Sienna . . . as it is desired to change the kinds of marbles and finishes as follows; for which a proposal is requested. All standing marble except base to be American Sienna with a hone finish. There appears to be some question as to the possibility of obtaining American Sienna in the sizes and quantity required without an objectionable variation in color. The sample forwarded shows a much greater variation than desired and in case you find that you cannot furnish this marble in a more uniform shade, please so advise this office." The writer goes on: "The above quotation speaks for itself. We have thought for some time that the Supervising Architect was contemplating changing the marble. . . . We would suggest that you make a thorough

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investigation and after so doing, if you find that you can supply the kind of marble that the Government wants, forward us the proposal for the changes, also, the samples requested." The plaintiff sent "another sample of American Sienna" and stated that the price "would be the same whether polished or honed."

On January 2, 1915, in reply to inquiry of the plaintiff in a letter of December 30, 1914, the defendants stated that the samples were not satisfactory "on account of the extreme variations in the markings," and "it was decided to use another kind of marble." On January 5, 1915, the plaintiff wrote, "We are willing to give you any kind of material that the quarry will produce stone to meet."

On January 23, 1915, the defendants wrote, "We will not deny that we gave you the order, but you must bear in mind that samples of all marble that is used in the different Post Office Buildings must be submitted to the Supervising Architect for his approval. You sent us a sample which we forwarded to the Supervising Architect and it was not satisfactory. You were so notified and sent us another sample. This we also forwarded and it was not satisfactory and after that it was decided to change from American Sienna to Meadow Pink Tennessee."

In addition to the fifty-three letters and telegrams submitted in evidence (from which the foregoing excerpts have been somewhat concisely abstracted), the defendants' only witness, Yeager, affirmed, and the witnesses for the plaintiff denied, that there was annexed to the specifications furnished the plaintiff, which accompanied plans showing "the parts of the building where the different kinds of marble were to be used and the quantities of each kind, but made no reference to the submitting of samples," a sheet that, under the heading "samples," had a provision which read: "The following samples must be submitted, charges prepaid, to the Supervising Architect or to the superintendent, as indicated, for approval. Each list shall be forwarded within the specified time from the date of the award of contract, and in not more than two shipments, to the Supervising Architect. Marble. Two pieces of each kind, $\frac{7}{8} \times 12 \times 12$ inches, showing finishes and extreme variations in color and markings." The defendants further offered to show by this witness, "that in the construction of government buildings there is a universal, or practically a universal understanding, sufficient to amount to a general custom in the

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business, that samples shall be submitted subject to approval and rejection by the Supervising Architect."

Other than might be inferred should the judge find the provision above quoted relating to "samples" was annexed to the specifications which accompanied the plans furnished the plaintiff by the defendants, no evidence was offered to show that the plaintiff had knowledge of the terms of the defendants' contract or of any usage in building contracts with the Federal government to provide that samples must be submitted to and approved by the "Supervising Architect" before any material could be used in government buildings.

In proof of the alleged general or universal custom, the defendants' witness, in reply to questions from the judge, stated that the provision "that samples shall be submitted subject to approval and rejection by the Supervising Architect," was written into every contract that he had taken. The presiding judge excluded the testimony on the ground that there was no offer by the defendants to show the plaintiff had knowledge of such custom, and on the ground that it was not a matter of custom but of contract, "written into every contract he has taken." To this ruling the defendants excepted. The evidence offered did not require a finding that the alleged custom or usage was a general or universal custom, or that it was more than a particular usage or requirement that there be inserted in all contracts for the construction of government buildings a provision that samples must be submitted and approved before any material could be used. This was not a custom of such general and universal application that the plaintiff must be presumed to have had knowledge of it; and there was no evidence of actual knowledge. Under these conditions we are of opinion the ruling was right. *Stevens* v. *Reeves*, 9 Pick. 198. *Barrie* v. *Quinby*, 206 Mass. 259. *Coyne* v. *Byrne*, 218 Mass. 99.

It was the contention of the defendants that the contract, which they do not deny making, was conditional upon approval of the samples by the "Supervising Architect."

At the close of the evidence the defendants moved "that the court find and rule that upon all the evidence the plaintiff is not entitled to recover and that the defendants should have judgment." They also made requests for specific findings of fact and rulings of law. The bill of exceptions does not contain the motion

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or the requests, but it is agreed that they may be considered as if extended in the record by force of the statement in the bill of exceptions that "The pleadings and all papers filed at the trial are made a part of these exceptions." The judge reserved his decision upon the motion, the requests for findings of fact and for rulings of law. Later, in the absence of counsel and subsequent to the trial, he filed a decision for the plaintiff, a refusal to make the findings and rulings, and a denial of the motion. On the back of the motion the judge made the following indorsement: "December 29, 1916. Motion overruled, and defendants' rights saved by exception and appeal." And the docket entry reads "(11) Mo. for judgment for Deft. Dec. 29–16. Overruled & deft. appeals and excepts Dec. 29–16."

Assuming without deciding that the exceptions of the defendants were duly saved, they must nevertheless be overruled. The judge in finding for the plaintiff must necessarily have found as a fact that the provision in the defendants' contract with the United States Government relating to "samples" was not annexed to the specifications submitted by the defendants to the plaintiff, and he must also have found that the plaintiff was without knowledge in fact of such a requirement in governmental contracts. In the absence of such evidence of knowledge on the part of the plaintiff, we are of opinion that the letters above quoted clearly establish a contract between the plaintiff and the defendants, and the breach thereof by the defendants.

No exception lies to the refusal of a judge sitting without a jury to make specific findings of fact. *Jaquith* v. *Morrill*, 204 Mass. 181. *Wells* v. *Wells*, 209 Mass. 282, 291.

No error of law apparent on the record appears to have entered into the decision of the judge. The finding for the plaintiff was based apparently on facts proved and the inferences of the judge therefrom. *Cochrane* v. *Boston*, 1 Allen, 480. *Knowles* v. *Bachelder*, 106 Mass. 343.

It follows that the exceptions must be overruled and the appeal dismissed.

So ordered.

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GIOVANNI LAMANNA *vs.* AMERICAN EXPRESS COMPANY.

Middlesex. May 13, 1918. — June 25, 1918.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & PIERCE, JJ.

Agency, Scope of employment.

If a porter in the employ of an express company at a railroad station, who in the course of his duty is carrying a loaded revolver in a holster, when he is resting at the stand of a bootblack is asked by one of two bootblacks there whether a cartridge which that bootblack has in his possession will fit his revolver, and thereupon the porter draws the revolver from the holster and as he does so the revolver goes off and the other bootblack is shot in the leg, the injured bootblack cannot maintain an action against the express company employing the porter for his injuries thus sustained, because there is no evidence for the jury that the porter in drawing the revolver from the holster was acting in the course of his employment.

TORT for personal injuries sustained on June 10, 1915, from being shot in the leg by a revolver alleged to have been handled negligently by a servant of the defendant and which such servant was required by the defendant to carry while in the performance of his duties. Writ dated January 5, 1916.

In the Superior Court the case was tried before *King*, J. The plaintiff testified that in June, 1915, he was employed at the railroad station in Lowell as a bootblack and had been employed there since 1910; that on June 10, 1915, at about half past four o'clock in the afternoon he was at his place of business, not working at the time but standing at the place of his work, where there were two shoe shining stands, which stood outside the station in the archway; that there was a little chair between the two shoe shining stands and that he was sitting there, and Dominic Digiorgio, who worked with him, was standing at his right between the two foot rests of one of the stands; that at about that time there was a train due going north; that Henry O'Brien, who was employed by the American Express Company, pulled up his truck as usual and, leaving it against a post, came over to them and sat down on the left of the plaintiff between the two foot rests of the double polishing stand; that O'Brien picked up a newspaper that was on a chair

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and started to read it, and Dominic Digiorgio happened to have in his possession a cartridge and he pulled it out and said, "Henry, will this fit your revolver?"; that O'Brien took it in his hand and said, "No this would n't do because this is for a rifle, and not for a revolver," and at the same time he turned round and said to the plaintiff, "Get out of that chair and let me sit there, I want to try this on;" that the plaintiff got out of the little chair and let him sit there, and at one instant he pulled out his revolver and off it went, and the bullet went through the plaintiff's right leg.

O'Brien testified "that in June, 1915, he was employed by the American Express Company and had been working for them for about three years; that at the time of the accident he was employed as a porter, his duties being to take stuff from trains and take it into the freight house, checking it up and taking stuff from the freight house to the trains; that at the time he had been working on porter duty for about five months; that while on duty he carried fire arms when taking money from messengers on the trains back into the office; that he would carry the gun twelve or fifteen times a day; . . . that on the day of the accident he secured the gun at about twenty-five minutes to five and had it five to eight minutes while he was waiting for the train to come in; that on that day he just took and put the money bag and put the belt round him, walked out and got the truck and stopped in front of the archway waiting for the train to come in; and went over and sat down and commenced to read the paper; and Dominic asked him if a bullet would fit the revolver and he said, 'No;' that he was sitting down and he got up and asked the plaintiff to let him sit in his chair; and he sat down in the chair and went to take the gun out of the holster and off it went almost instantly."

Dominic Digiorgio testified substantially to the same effect. He testified that he "happened to have a little cartridge in his pocket which someone gave him who had found it and he asked O'Brien, 'Will this fit your revolver?'"

At the close of the evidence the defendant made a motion that the court order the jury to return a verdict for the defendant for the following reasons:

"1. On all the evidence the plaintiff is not entitled to recover.

"2. There is no evidence that the defendant was negligent.

"3. There is no evidence that the defendant's employee O'Brien

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was acting within the scope of his duty as an employee in handling the revolver at the time of the accident."

The judge ruled that the action could not be maintained; but, after conference with counsel, submitted the case to the jury for the assessment of damages. The jury assessed damages for the plaintiff in the sum of $500, and the judge reported the case for determination by this court, it being stipulated by the parties that, if the case should have been submitted to the jury, judgment was to be entered for the plaintiff in the sum of $500; otherwise, judgment was to be entered for the defendant.

The case was submitted on briefs.

A. M. Pinkham, for the defendant.

J. J. Kerwin & J. C. Reilly, for the plaintiff.

LORING, J. The count on which the plaintiff went to trial was a count alleging that he was shot by one O'Brien through the carelessness and negligence of O'Brien in handling a revolver in the course of his employment as a servant of the defendant. The evidence went no further than to warrant the jury in finding that a third person asked O'Brien to see whether a cartridge which he had picked up would fit the revolver O'Brien was carrying in a holster through this belt in the course of his employment as the defendant's servant; that thereupon O'Brien drew the revolver from the holster and that as he did so the revolver went off and the plaintiff was shot in the leg. On this evidence the jury were not warranted in finding that in drawing the revolver from the holster O'Brien was acting in the course of his employment as a servant of the defendant.

In accordance with the terms of the report the entry must be

Judgment for the defendant.

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COMMONWEALTH *vs.* JOSEPH WAKELIN.

Middlesex. May 20, 1918. — June 25, 1918.

Present: RUGG, C. J., LORING, CROSBY, PIERCE, & CARROLL, JJ.

Practice, Criminal, Plea, Indictment, *Nolle prosequi,* Challenge of jurors. *Homicide. Jury and Jurors. Evidence,* Relevancy and materiality, Competency, Conversation heard by dictograph, Declaration of deceased person, To rebut incompetent but material evidence admitted without objection. *Dictograph. Husband and Wife. Words,* "Kill," "Murder."

A defendant in an indictment for murder may not plead "Not guilty" and at the same time as a matter of right reserve the privilege of filing thereafter, either by way of substitution or otherwise, motions, pleas or other matters in their nature preliminary.

The determination of the question, whether after pleading "Not guilty" to an indictment for murder, either in the absence of or by advice of counsel, the defendant shall be permitted to retract such plea and file others, is wholly within the discretion of the court.

An indictment alleging that the defendant on a certain day "at Melrose in the County of Middlesex aforesaid, did assault and beat W with intent to murder her, and by such assault and beating did murder W. Against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided," is sufficient as an indictment for murder.

It is not improper for a judge presiding at the trial of an indictment for murder, to which the defendant has pleaded "Not guilty," to hear, after the jury has been impanelled and in their absence, motions by the defendant for leave to file motions to dismiss and to quash the indictment.

It is not an improper exercise of discretion for the presiding judge to refuse to grant a motion for particulars as to the indictment above described, asking "in what manner and by what means" the defendant assaulted the deceased, "what was the cause of" her death, and "how and in what manner did the alleged assault and beating . . . cause" her death.

There is no such pleading as a disclaimer known to our system of criminal pleading and practice.

The character of a pleading is to be determined by the nature of its averments and not by the name attached to it.

The district attorney, before the impanelling of the jury for the trial of the indictment above described, filed a paper entitled a "disclaimer," in which he in substance said "that the above mentioned indictment sets forth and charges the commission of a crime greater than that which the Commonwealth expects to be able to prove, that is to say, the crime of murder; that the Commonwealth, therefore, disclaims and does not and will not ask or contend for a conviction of the defendant for the crime of murder in either the first or second degree; that the Commonwealth will only ask and contend for the conviction of the" de-

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fendant "for the crime of manslaughter, a crime of less degree than that specifically set forth in the indictment above mentioned." *Held*, that the instrument was in effect a *nolle prosequi* of so much of the indictment as charged a crime of higher magnitude than manslaughter, and that it was not susceptible of misunderstanding as to its essence and its real effect.

The word "kill" is not absolutely requisite to a description of the crime of manslaughter.

Where an indictment charges that the defendant "did assault and beat W with intent to murder her, and by such assault and beating did murder W," the district attorney has power to enter a *nolle prosequi* as to so much of the indictment as charged a crime greater than manslaughter.

Upon the impanelling of a jury after the entry of such *nolle prosequi*, the defendant was not entitled to challenge peremptorily more than two jurors.

Where, before the entry of such *nolle prosequi*, the defendant had pleaded "Not guilty," it was not necessary that he again should be called upon to plead.

At the trial of an indictment for manslaughter against a man, a witness, who is not an electric or telephone expert, may be permitted to describe the parts, produced in court and identified by him, of a dictograph apparatus installed by him in cells where the defendant and his wife were confined and to describe the way in which the apparatus was arranged and was connected in another room with a receiver used by a person to overhear conversations between the defendant and his wife.

A witness who, by means of such dictograph, overheard conversations between the defendant and his wife which were upon matters material to the issues on trial, and who testifies that he recognized their respective voices, may be permitted to state what he heard, the question, what weight should be given to the testimony, being for the jury.

The circumstance, that the conversation so overheard was between husband and wife when physically alone, is no ground for objection to the admissibiity of the evidence, R. L. c. 175, § 20, cl. 1, not being applicable and there being no rule of law that a third person who overhears a conversation between a husband and his wife, intended to be private, may not testify what it was.

Whether R. L. c. 175, § 66, to the effect that a declaration of a deceased person shall not be "inadmissible in evidence as hearsay if the court finds that it was made in good faith before the commencement of the action and upon the personal knowledge of the declarant," is applicable at the trial of an indictment for manslaughter, here was not decided, evidence which was excluded partly on that ground having also been excluded rightly because the presiding judge found that the statements offered were not made in good faith.

Where the district attorney at the trial of an indictment for manslaughter fails to require the exclusion, as incompetent, of evidence tending to show that a third person out of court had confessed to the commission of the crime with which the defendant was charged, he is not thereby precluded from objecting to the introduction of further evidence of statements by the same third person tending to substantiate his alleged confession.

The Commonwealth, having failed at the trial of an indictment for manslaughter to require the exclusion as incompetent of evidence of a confession by a third person of the commission of the crime with which the defendant was charged, and such testimony being admitted, may be permitted against the objection of the defendant to introduce testimony tending to show that at the time of the

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commission of the crime such third person was in a distant part of the Commonwealth.

If evidence, which is incompetent by reason of a rule of law, but is material to the issue on trial, is admitted without objection, it is entitled to its probative force and therefore can be contradicted.

INDICTMENT, found and returned in the county of Middlesex on June 7, 1917, charging that the defendant on June 1, 1916, at Melrose "did assault and beat Lauretta W. Wakelin, with intent to murder her, and by such assault and beating did murder Lauretta W. Wakelin."

Certain motions by the defendant and their disposition are described in the opinion. The portions of the motions for a bill of particulars which were denied asked for specifications "in what manner and by what means" the defendant assaulted the deceased, "what was the cause of" her death, and "how and in what manner did the alleged assault and beating . . . cause" her death.

The so called "disclaimer," referred to in the opinion, was filed before the impanelling of the jury and was as follows:

"And now comes the Commonwealth of Massachusetts, by Nathan A. Tufts, District Attorney for the Northern District, and says that the above mentioned indictment sets forth and charges the commission of a crime greater than that which the Commonwealth expects to be able to prove, that is to say, the crime of murder; that the Commonwealth, therefore, disclaims and does not and will not ask or contend for a conviction of the defendant for the crime of murder in either the first or second degree; that the Commonwealth will only ask and contend for the conviction of the aforesaid Joseph Wakelin for the crime of manslaughter, a crime of less degree than that specifically set forth in the indictment above mentioned."

The defendant was tried before *Keating*, J. The material evidence, incidents of the trial and exceptions of the defendant are described in the opinion. The defendant was found guilty and alleged exceptions.

The case was submitted on briefs.

W. R. Scharton & H. J. Barry, for the defendant.

N. A. Tufts, District Attorney, *G. S. Harvey*, Assistant District Attorney, & *F. W. Fosdick*, Deputy District Attorney, for the Commonwealth.

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RUGG, C. J. The defendant on June 21, 1917, pleaded not guilty to an indictment charging him in the statutory form with the crime of murder, attempting at the same time to reserve "the right to file special pleas later." There is no rule of practice or procedure whereby a defendant in a prosecution for crime may plead to the general issue and as of right reserve the privilege of filing thereafter, either by way of substitution or otherwise, motions, pleas or other matters in their nature preliminary, such as a "plea in abatement" or a "motion to dismiss." Whether a plea of not guilty or of guilty, entered either in the absence or by advice of counsel, may be retracted and other pleadings filed, is a matter wholly for the court to determine in its discretion. *Commonwealth* v. *Chapman*, 11 Cush. 422. *Commonwealth* v. *Blake*, 12 Allen, 188. *Commonwealth* v. *Ingersoll*, 145 Mass. 381. *Commonwealth* v. *Mahoney*, 115 Mass. 151. The plea of not guilty was in effect a waiver of matters in abatement. *Commonwealth* v. *Lewis*, 1 Met. 151, 152.

The presiding judge simply permitted the defendant to file motions praying that he be permitted to file the preliminary plea, and after a hearing refused to allow it to be filed. The motion to dismiss alleged substantially the same reasons and stands on the same footing. Manifestly there was no error in this regard. Whether such motions be allowed or denied rested in the discretion of the judge. The judicial discretion appears to have been exercised wisely. Whatever of substance there may have been in the plea or motion, if any, is not before us on the merits. *Commonwealth* v. *Tucker*, 189 Mass. 457, 463. *Commonwealth* v. *Hayden*, 163 Mass. 453.

The motion to quash is grounded on the contention that the indictment does not follow the statutory form for murder set out in the schedule of forms annexed to R. L. c. 218, at page 1850. It is not now open to argument that the statutory form is inadequate. It is settled that it is sufficient. *Commonwealth* v. *Jordan*, 207 Mass. 259, and cases collected at page 266. *Commonwealth* v. *Allison*, 227 Mass. 57, 61. The indictment in the case at bar follows the skeleton form of the statute without amplification. In the particulars that it omits any averment as to the manner in which the defendant assaulted and beat the deceased, as to the wound given, or the part of the body upon which the mortal injury was

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inflicted, or the time of death, it follows precisely the one held sufficient in the leading case of *Commonwealth* v. *Jordan*, *supra*. The motion to quash was overruled rightly, whether treated as relating to form or substance. It is of no consequence in this connection whether the motion be treated as a motion to quash or as a request to be allowed to file such a motion. In either event no right of the defendant has been affected.

The hearing of the several motions of the defendant, after the jury were impanelled rather than before but in their absence, presents no erroneous ruling of law under the circumstances here disclosed.

There was no error in the denial of parts of the defendant's motion for a bill of particulars. The specifications filed by the Commonwealth in addition to the allegations of the indictment furnished to the defendant ample information as to the nature and grounds of the crime with which he was charged. The crime thus was "fully and plainly, substantially and formally described" to him as required by the Constitution. Details of the assault, particularity respecting the cause of death, and precise nicety as to the relation of the beating to the fatal result, are not required. The refusal of the requests for particulars, so far as denied, was within the discretion of the court and his ruling was justified upon the authority of *Commonwealth* v. *King*, 202 Mass. 379, *Commonwealth* v. *Kelley*, 184 Mass. 320, and *Commonwealth* v. *Jordan*, 207 Mass. 259, 266, 267. The indictment did not allege and there is nothing to indicate that the assaulting and beating were done with any instrument or implement. On this and perhaps on other grounds the case at bar is quite distinguishable from *Commonwealth* v. *Sinclair*, 195 Mass. 100.

The district attorney was permitted to file a paper entitled a "disclaimer." There is no such pleading as a disclaimer known to our system of criminal pleading and practice. It is an appropriate descriptive term in pleading in real actions, *Prescott* v. *Hutchinson*, 13 Mass. 439, and under trustee process, *Mortland* v. *Little*, 137 Mass. 339, and it is familiar in patent law, and perhaps in other connections. The character of a pleading, however, is commonly to be determined by the nature of its averments and not by the name attached to it. An analysis of the paper here in question shows that in substance it is a declaration by the district

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attorney that he will not ask for a conviction of the defendant for the crime of murder in either the first or second degree, but will only contend for his conviction of the crime of manslaughter. In substance that is a voluntary declaration that he will not further prosecute the portions of the indictment alleging the circumstances of aggravation which distinguish that kind of homicide constituting murder from the less heinous offence of manslaughter. The correct expression of that declaration by a district attorney is *nolle prosequi*. *Commonwealth* v. *Casey*, 12 Allen, 214, 218. It is within the power of a district attorney to enter a *nolle prosequi* either as to an entire indictment, or any count thereof, or any distinct and substantive part of it so long as there remains a charge of an offence originally set forth. *Commonwealth* v. *Tuck*, 20 Pick. 356, 366. *Commonwealth* v. *Dunster*, 145 Mass. 101. The district attorney may at his own pleasure enter a *nolle prosequi*. *Commonwealth* v. *Tuck*, 20 Pick. 356, 366, 367. *Lizotte* v. *Dloska*, 200 Mass. 327. The right and brief form of statement in the case at bar would have been that he would not further prosecute so much of the indictment as charged any higher crime than that of manslaughter or, as charged, murder in either degree, or some similar phrase. But the substance of what was undertaken is plain. It was in effect a *nolle prosequi* of so much of the indictment as charged a crime of higher magnitude than manslaughter. That is a well recognized part of criminal procedure. The statement filed by the district attorney is not susceptible of misunderstanding as to its essence and its real effect. It would be sacrificing substance to unimportant form to hold that the defendant had suffered any harm by reason of this irregularity.

It is well established that upon an indictment for murder a defendant may be found guilty of manslaughter. The lesser homicide is included in the charge of the greater. The present indictment does not contain the word "kill," which is aptly descriptive of the crime of manslaughter. It was in this form: "The jurors for the Commonwealth of Massachusetts on their oath present, That Joseph Wakelin on the first day of June in the year of our Lord one thousand nine hundred and sixteen at Melrose in the County of Middlesex aforesaid, did assault and beat Lauretta W. Wakelin, with intent to murder her, and by such assault and beating did murder Lauretta W. Wakelin. Against

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the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided." But "kill" is not such a word or act as to be absolutely requisite to a description of the crime of manslaughter. As was said by Chief Justice Shaw in *Commonwealth* v. *Roby*, 12 Pick. 496, 504, 505, "The indictment for murder necessarily charges the fact of killing, as the essential and most material fact, which gives its legal character to the offence." Murder of necessity imports the killing of a human being. See *Commonwealth* v. *Chance*, 174 Mass. 245, 252. The statutory definition of "murder" as used in an indictment is, "The killing of a human being, with malice aforethought." R. L. c. 218, § 38. If the indictment in the case at bar had charged that the defendant did kill the deceased with malice aforethought, it could not rationally be contended that it would not be sufficient to support a verdict of manslaughter. It is equally sufficient to that end when the more succinct word "murder" is used. If the amplified phrase above supposed had been used, probably no one would urge that the district attorney could not enter a *nolle prosequi* as to so much of the indictment as charged that the homicide was committed "with malice aforethought." It is equally in his power to do so when the only word used is the more comprehensive term "murder," which is, both according to statutory definition and common and approved usage of the language, the exact equivalent of the longer expression. In principle this point is concluded against the defendant by *Commonwealth* v. *Dean*, 109 Mass. 349. See, in this connection, *Commonwealth* v. *Hall*, 142 Mass. 454, and R. L. c. 219, § 14.

After the entry of the *nolle prosequi* by the district attorney, the highest crime for which the defendant could be tried on the indictment was manslaughter. The defendant was put upon his trial for manslaughter and not for murder. Hence he was not entitled to challenge peremptorily more than two jurors. R. L. c. 176, § 29.

It was not necessary that he should be called again to plead. He had already pleaded not guilty to the indictment. That plea was addressed to every part as well as to the whole of the indictment. But he was given the opportunity by the court to plead anew, a privilege which he declined. In all this there was no error.

The testimony of a witness respecting the search made of the

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ground and other natural objects near the place where the body of the deceased was found, and the later discovery of a book not there on the earlier occasion, the tracks of rubber boots, the height of the water in a nearby pond, and statements made to him by the defendant all related to pertinent matters and were admitted rightly.

A witness named Smith testified respecting a mechanical contrivance called a dictograph, installed by him in the cells where the defendant and his wife (who appears to have been arrested at the same time) were later on the same day confined. The contrivance was produced in court and identified. He described its parts and the way in which they were arranged in the cells and connected in another room with a receiver used by him. He and another witness, who made stenographic notes of what he heard, were then permitted to narrate a conversation which, by means of this mechanism, each overheard between the defendant and his wife, the voices of each being recognized by both witnesses. In all this there was no error. The witness Smith, although not an electric or telephonic expert, was describing his own experiences and observations as to an apparatus which had the quality of transmitting the sounds produced by the human voice in a room after the manner of a telephone. No scientific explanation of the apparatus or of the phenomena produced by it was necessary. *Lord Electric Co.* v. *Morrill*, 178 Mass. 304. It was for the jury to say what weight should be given to the testimony. *McCarthy* v. *Peach*, 186 Mass. 67.

The circumstance that the conversation was between a husband and wife while they were physically alone is no ground for objection. There is no rule of law that third persons who hear a private conversation between a husband and wife shall be restrained from testifying what it was. *Commonwealth* v. *Griffin*, 110 Mass. 181. It is of no consequence whether such conversation is overheard by a witness nearby concealed from observation, or by one at a distance enabled to overhear by means of electrical or other devices which carry the sound of the voice. The provision of R. L. c. 175, § 20, cl. 1, simply prohibits either the husband or the wife from testifying to private conversations with one another. It forbids one method of proof, but does not exclude proof by other means. *Sampson* v. *Sampson*, 223 Mass. 451, 458–460.

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Testimony as to conversations heard over the dictograph appears to have been considered in *State* v. *Minneapolis Milk Co.* 124 Minn. 34, 43, and *People* v. *Eng Hing*, 212 N. Y. 373, 387. There is no reason why it is not competent.

The defendant called a witness who testified without objection that during a part of 1917 he occupied a cell in the Springfield jail with one Ducharme, who before the arrest of the defendant told the witness that he, Ducharme, killed Lauretta W. Wakelin (the person for whose killing the defendant was indicted); that Ducharme also showed the witness a newspaper account of the arrest of the defendant for the murder of Lauretta; and that Ducharme later made a confession in writing which the witness had submitted to Mr. Clark, the sheriff of Hampden County; and that Ducharme was dead, having been executed at the State prison. The defendant thereupon asked the witness to state the details respecting the locality and manner of killing Lauretta as told him by Ducharme, accompanying the question with offer of proof of testimony which, if Ducharme had himself been a witness would have been competent. This was excluded upon objection being made, the judge ruling that R. L. c. 175, § 66, did not apply to criminal cases, and second, finding as matter of fact that the alleged statement was not made in good faith. It becomes unnecessary to consider the soundness of the ruling, as to which see *Commonwealth* v. *Stuart*, 207 Mass. 563, 568, because the preliminary finding of the judge that the statement was not made in good faith rendered necessary its exclusion. *Carroll* v. *Boston Elevated Railway*, 210 Mass. 500. *Slotofski* v. *Boston Elevated Railway*, 215 Mass. 318. *McSweeney* v. *Edison Electric Illuminating Co.* 228 Mass. 563.

The contention of the defendant in substance is that because the evidence as to the confession, although incompetent, had been admitted without objection, it thereupon became permissible for him as of right to introduce further evidence to the same effect likewise incompetent. Waiver of necessary formality of proof as to one piece of evidence does not open the door to all evidence of the same kind. Failure on the part of the district attorney to object to some incompetent evidence does not estop him from making objection to other like incompetent evidence. It is the law of this Commonwealth that confessions by third persons out

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of court to the commission of the crime with which the defendant is charged, are inadmissible. *Commonwealth* v. *Chabbock*, 1 Mass. 144. *Commonwealth* v. *Felch*, 132 Mass. 22. It was said in *Donnelly* v. *United States*, 228 U. S. 243, 273, 274, in reaching the same conclusion, that "In this country there is a great and practically unanimous weight of authority in the State courts against admitting evidence of confessions of third parties made out of court and tending to exonerate the accused." No reason is disclosed in the circumstances of the case at bar for relaxing that salutary rule.

The evidence as to the confession having been admitted without objection was entitled to its probative force. *Hubbard* v. *Allyn*, 200 Mass. 166, 171. *Wood* v. *Blanchard*, 212 Mass. 53, 55. *Diaz* v. *United States*, 223 U. S. 442, 450. It therefore was permissible for the Commonwealth to introduce evidence to rebut its force by showing that Ducharme was in a distant part of the State on the day when the crime with which the defendant was charged, was committed, and for several preceding and following days. The testimony as to the confession was not immaterial. It was pertinent, but incompetent as evidence because of the means of proof. The confession having been offered by the defendant and having been admitted without objection and being material, it stood on the same footing as to contradiction as any other material evidence. It gained no added sanctity or security because, although incompetent, it had been admitted without objection. It is immaterial evidence alone which can be contradicted only in the discretion of the presiding judge. *Bennett* v. *Susser*, 191 Mass. 329, and cases cited at page 330.

All the other exceptions saved by the defendant have been examined carefully. But there is nothing in them which calls for comment. No error is disclosed.

Exceptions overruled.

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JAMES W. AINSLEE *vs.* MARY A. BOSCKETTI.

Essex. May 20, 1918. — June 25, 1918.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

Mechanic's Lien. Statute, Repeal.

For the purpose of enforcing a mechanic's lien which came into existence before January 1, 1916, R. L. c. 197, § 10, was not repealed by St. 1915, c. 292, § 13. Following *See* v. *Kolodny*, 227 Mass. 446.

PETITION, filed in the District Court of Lawrence on January 25, 1916, under R. L. c. 197, § 10, to enforce a mechanic's lien on a building and the land upon which it was situated owned by the respondent on Broadway and Holly Street in Lawrence.

A certificate of the lien sought to be enforced was filed by the petitioner in accordance with the provisions of R. L. c. 197, § 6, in the registry of deeds for the Northern District of Essex on November 24, 1915.

On February 16, 1916, the respondent filed in the District Court a motion that the petition be dismissed for want of jurisdiction. On February 23, 1917, judgment was entered in the District Court establishing the lien in the sum of $23.76 with $15.04 costs. The respondent appealed to the Superior Court.

The case was heard on appeal by *Dubuque*, J., the facts being admitted as they appeared in the records and pleadings. No question was raised as to the sufficiency of the statement filed in the registry of deeds. The respondent filed a motion to dismiss the petition for want of jurisdiction. The judge denied the motion and made the following rulings:

"1. That the District Court of Lawrence, and the Superior Court on appeal, had jurisdiction under the provisions of R. L. c. 197 to entertain said petition for enforcement of liens;

"2. That St. 1915, c. 292, did not abrogate the provisions of R. L. c. 197 as to lien proceedings begun subsequently to the passage of said act but prior to its taking effect;

"3. That the provisions of St. 1915, c. 292, in repealing the pro-

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visions of R. L. c. 197 did not oust the court of its jurisdiction to entertain the petition for the enforcement of the lien;

"4. That, even if such procedure were invalid, it was cured by the enactment of St. 1916, c. 163, and St. 1917, c. 213;

"5. That the provisions of St. 1916, c. 163 of St. 1917, c. 213, were merely procedural, therefore not unconstitutional as having retroactive effects on substantive rights."

The judge ordered that a decree be entered for the petitioner establishing the lien; and the respondent alleged exceptions to the rulings of the judge and the order for the decree.

The case was submitted on briefs.

J. A. O'Mahoney, for the respondent.

W. T. Rochefort, for the petitioner.

LORING, J. On October 30, 1915, the petitioner "completed his labor" under a contract for the alteration of a building situate within the jurisdiction of the District Court of Lawrence. On November 24, 1915, he filed in the registry of deeds the certificate called for by R. L. c. 197, § 6, and on January 25, 1916, he brought a petition in the District Court of Lawrence to enforce the lien to which he had thus become entitled. Judgment in his favor was rendered by the District Court and by the Superior Court on appeal. The case is here on exceptions which raise the question of the jurisdiction of the District Court and of the Superior Court on appeal to entertain the petition and render the judgments which they rendered.

The contention of the respondent is that the jurisdiction of the court had come to an end on January 1, 1916, because of the repeal of R. L. c. 197, § 10 (on which its jurisdiction rested) by St. 1915, c. 292, § 13, which (by force of § 14 of that act) took effect on January 1, 1916.

The contention is disposed of by the decision of this court in *See* v. *Kolodny*, 227 Mass. 446.

In that case two petitions to enforce mechanics' liens were brought before January 1, 1916, but they were not disposed of until after that day. The contention in that case was that the jurisdiction of the Superior Court over these petitions came to an end on January 1, 1916, by force of St. 1915, c. 292, §§ 13, 14. It was decided that it did not. That conclusion was not reached on the ground that by a general statutory provision there is a saving

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clause in case of the repeal of a statute as far as pending causes are concerned. There is no such statute in civil cases. Nor was the decision in *See* v. *Kolodny* put upon the ground that since the Superior Court had jurisdiction under the new act (St. 1915, c. 292, § 4) it was not of consequence that its jurisdiction under R. L. c. 197, § 10, had come to an end. It was decided in *See* v. *Kolodny* that the Superior Court had jurisdiction because: "In this Commonwealth a mechanic's lien is not created upon the filing of a certificate and a petition but is created as soon as labor or material, or both, is performed or furnished on real estate. The lien is an interest in the property, stands as security for the payment of the debt, is a vested right and is not an additional and extraordinary remedy which the Legislature may discontinue at pleasure. . . . In accordance with the general rule the statute must be construed as intended to have a prospective and not a retroactive effect where, as in the case at bar, retrospective construction will interfere with a vested right. . . . That such was the intention of the Legislature see St. 1916, c. 163, St. 1917, c. 213."

By enacting St. 1915, c. 292, the Legislature adopted a new mechanic's lien law. The mechanic's lien law described in St. 1915, c. 292, differed essentially from that theretofore in effect and was in no sense an amendment of the mechanic's lien law theretofore existing. For example the lien for labor performed in the absence of a notice was different from that under the old law (compare St. 1915, c. 292, § 1, with R. L. c. 197, § 2) and the new act contained the novel provision that if a written notice there specified was given by the contractor and recorded in the registry of deeds, all persons furnishing labor and materials under it or under any subcontract pursuant to it should have a lien to be enforced by a bill in equity to be brought in the Superior Court in behalf of all persons interested. See St. 1915, c. 292, §§ 2–4. The new act (St. 1915, c. 292, § 13), in terms repealed those sections of R. L. c. 197, which dealt with the creation of a mechanic's lien under the former law (namely §§ 1, 2, 3, 4, 5, 6, and 7 of R. L. c. 197) and it also repealed § 10 of R. L. c. 197 which gave to the Superior Court and to the inferior courts there specified concurrent jurisdiction to enforce the lien provided for in these earlier sections of R. L. c. 197. It was provided by § 14 of St. 1915, c. 292, that the new act should go into effect on January 1, 1916. But nowhere in the new act

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was a provision inserted dealing with cases where (by reason of work done or materials furnished under R. L. c. 197) a vested right to a lien had come into existence before January 1, 1916. Under these circumstances it was decided in *See* v. *Kolodny* that the repeal of those sections of R. L. c. 197 which are repealed by St. 1915, c. 292, § 13 (including § 10 which gave jurisdiction to the Superior Court and to the inferior courts there specified) applied to future liens which should come into existence under the new act and did not (as matter of construction of § 13 of St. 1915, c. 292) apply to cases where by force of R. L. c. 197, mechanics had acquired a vested right to a lien before January 1, 1916. That is to say for the purpose of enforcing a lien which came into existence before January 1, 1916 (when the new act went into effect) R. L. c. 197, § 10, was not repealed by St. 1915, c. 292, § 13.

Exceptions overruled.

HARRY P. CHADWICK *vs.* CITY OF CAMBRIDGE & others.

Middlesex. May 20, 1918. — June 25, 1918.

Present: RUGG, C. J., LORING, DE COURCY, PIERCE, & CARROLL, JJ.

Tax, Sale, Foreclosure of right of redemption, Right of municipality as purchaser at tax sale. *Municipal Corporations*, Right as purchaser at tax sale.

Where a city becomes the purchaser of land sold by its collector of taxes at a tax sale, it receives a title subject to the later and paramount lien that may arise from taxes assessed after those for the collection of which the sale was made.

Upon a petition in the Land Court under St. 1915, c. 237, § 4, by the holder of a tax title to land in a city for the foreclosure of the right of redemption therefrom, it is proper for the trial judge to rule that the petitioner's title was paramount to titles acquired by the city through deeds of its collector of taxes to it as the purchaser at previous sales for the collection of taxes assessed and due in previous years.

PETITION under St. 1915, c. 237, § 4, filed in the Land Court on August 6, 1917, by the holder of a tax title to certain land in Cambridge acquired by a sale on July 9, 1915, for the collection of taxes for the year 1914, to foreclose rights of redemption from such sale.

The rights of all parties were disposed of excepting those of the city of Cambridge, which claimed under tax deeds at sales in

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1909, 1910, 1911, 1912, 1913, for the collection of taxes due, respectively, in the year preceding each of such sales.

The case was heard by *Davis*, J., who ruled and ordered "that the petitioner's title is paramount to the lien claimed by the respondent. Unless the respondent files forthwith an offer to redeem there must be a decree for the petitioner forever foreclosing and barring all rights of redemption." The respondent alleged exceptions.

The case was submitted on briefs.

J. A. L. Odde, H. F. R. Dolan & P. J. Nelligan, for the respondent.

W. A. Parker, for the petitioner.

PIERCE, J. This is a petition under the provisions of St. 1915, c. 237, to foreclose a tax title on land in Cambridge to which the respondent city of Cambridge holds earlier tax titles. The tax deeds under which the city claims liens for taxes were dated respectively in 1909, 1910, 1911, 1912 and 1913. The city never sold the land as unredeemed land under R. L. c. 13, § 67, St. 1909, c. 490, Part II, § 68, or St. 1915, c. 237, § 20. The tax deed under which the petitioner claims title was dated July 9, 1915. The validity of the several deeds by which the parties acquired their respective titles is not questioned, and each one was duly executed, delivered and recorded. At the trial the respondent city asserted "that prior tax titles held by a city constitute a lien which is not extinguished by a subsequent sale for taxes, and that any decree for the petitioner in this case must be made subject to the respondent's lien." The presiding judge ruled and ordered as follows: "I rule that the petitioner's title is paramount to the lien claimed by the respondent. Unless the respondent files forthwith an offer to redeem there must be a decree for the petitioner forever foreclosing and barring all rights of redemption." To this ruling the respondent excepted.

The deeds of the collector conferred upon the city a fee and seisin subject to the right of redemption in the same manner it would upon an individual purchaser. R. L. c. 13, §§ 43, 48. St. 1909, c. 490, Part II, §§ 44, 49. *Coughlin* v. *Gray*, 131 Mass. 56. *Parker* v. *Baxter*, 2 Gray, 185, 189. The tax title is also subject to the later and paramount lien arising from taxes thereafter assessed. "For the lien of each year's tax is paramount to all previous liens."

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Keen v. *Sheehan*, 154 Mass. 208, 209. *Parker* v. *Baxter*, *supra*. *Hunt* v. *Boston*, 183 Mass. 303, 305. *Abbott* v. *Frost*, 185 Mass. 398.

The respondent does not dispute that "The rule generally stated is that a sale of land for a valid tax gives a paramount title, free from the ownership or incumbrance of rights previously existing which had been carved out of the property by an owner, or which had been acquired in it by prescription or otherwise," Knowlton, C. J., in *Hunt* v. *Boston*, *supra*, and cases cited, but contends that the rule is not applicable where a municipality holds the earlier tax title. In support thereof it relies upon St. 1909, c. 490, Part II, § 67, as amended by St. 1915, c. 237, § 19, which reads: "If land is taken or purchased by a city or town, taxes shall, until foreclosure of the title so acquired, be assessed thereon as though the same were not so taken or purchased; and shall be deducted from the proceeds of the final sale;" also, upon St. 1915, c. 237, § 18, which reads: "After the foreclosure by a city or town of the rights of redemption under a tax title or taking, as hereinabove provided, the land shall thereafter be held and disposed of like any land belonging to it and held for municipal purposes, and shall not while so held be assessed for taxes;" also, upon St. 1909, c. 490, Part II, § 68, as amended by St. 1915, c. 237, § 20, which provides for the sale of unredeemed land "within two years after the time for redemption has expired, . . . ; and if, from any cause, such sale shall not be made within two years, it shall be made by the collector when he deems best or at once upon the service upon him of a written demand of any person interested therein. . . . He [the collector] shall deduct from the proceeds of said sale the expense thereof, the amount named in the collector's deed. . . . The balance shall be deposited with the city or town treasurer to be paid to the person entitled to the land, if demanded within five years. . . ."

It is true that the title conveyed by the deed of the collector is held by a municipality "as security for the repayment of the purchase price" until redemption or until the right of redemption is foreclosed in the manner provided by St. 1915, c. 237, §§ 4 to 9 inclusive, but it is equally true that under the same statutory provisions the title of an individual purchaser is held as security until foreclosure of the right of redemption. The statute above

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quoted relating to the sale of unredeemed land taken or purchased by a municipality, does not affect the validity or quality of the title acquired by it as a purchaser at a tax sale, and was intended only to define the method by which a municipality should dispose of its tax titles and account to the former owner, or person entitled to the land, for any surplus remaining after deducting "from the proceeds of said sale the expense thereof, the amount named in the collector's deed or instrument of taking as due when the same was executed, all interest, charges and subsequent taxes and assessments thereon." *Welch* v. *Haley*, 224 Mass. 261, 264.

The argument of the respondent that "The municipality would lose its taxes unless it sells the land as unredeemed land before the expiration of two years from the purchase by an individual of a subsequent tax title," is unsound, because if it redeems from that lien it could deduct the amount paid as a subsequent tax from the proceeds of the sale of the unredeemed land. We are of opinion the lien of a tax deed as security for the repayment of the purchase price, is paramount to all previous tax liens acquired by municipalities or individuals.

The ruling of the judge of the Land Court was right, and the exception thereto is overruled.

So ordered.

DANIEL E. DEMPSEY'S (dependent's) CASE.

Suffolk. May 20, 1918. — June 25, 1918.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Workmen's Compensation Act, Appeal. *Supreme Judicial Court. Superior Court. Jurisdiction.*

Under St. 1915, c. 132, which provides that "a memorandum of agreement approved by the Industrial Accident Board, shall have effect, notwithstanding an appeal, until it is otherwise ordered by a justice of the Supreme Judicial Court who may, in any county, suspend or modify such decree [of the Superior Court] . . . during the pendency of the appeal," a single justice has discretionary power to suspend a decree of the Superior Court ordering an insurer to make payments to the dependent widow of a deceased employee, from which the insurer has claimed an appeal, and the granting of such an order of suspension is a proper

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exercise of discretion if there is reasonable ground for raising the question of the insurer's right to appeal, although it afterwards is ordered by this court that the insurer's appeal be dismissed as claimed without right.

Under St. 1911, c. 751, Part III, § 11, as amended by St. 1912, c. 571, § 14, and St. 1917, c. 297, § 7, there is no right of appeal from a decree of the Superior Court "based upon . . . a memorandum of agreement" approved by the Industrial Accident Board.

The denial by the statute mentioned above of the right of appeal from a decree of the Superior Court based upon such a memorandum of agreement applies to an appeal attempted to be taken on the ground that the court was without jurisdiction of the proceeding because the injury for which compensation was awarded occurred on navigable waters and, under the Constitution of the United States, was cognizable only under admiralty jurisdiction.

PETITION, filed in the Superior Court on March 16, 1918, under St. 1911, c. 751, Part III, § 11, as amended by St. 1912, c. 571, § 14, and St. 1917, c. 297, § 7, by Agnes Dempsey, the dependent widow of Daniel E. Dempsey, a deceased employee, with whom as such dependent widow an agreement was entered into by the insurer under the provisions of the workmen's compensation act on March 29, 1917, which was approved by the Industrial Accident Board, by which agreement the insurer was to pay to the petitioner the sum of $10 a week for a period of four hundred weeks from November 9, 1916, alleging that the insurer had made the required payments up to August 9, 1917, but had made no payment since that time, and praying for a decree ordering the insurer to make the payments in accordance with its agreement.

The case was heard by *Fox*, J., who on March 25, 1918, made a decree that the payments be made with costs and that execution therefor issue against the insurer. The insurer appealed.

On April 18, 1918, the insurer filed in the Supreme Judicial Court a petition under St. 1915, c. 132, praying for an order by a justice of that court suspending the decree of the Superior Court described above during the pendency of its appeal.

The petition for the order of suspension was heard by *Loring*, J., who on April 24, 1918, made an order that the decree be suspended during the pendency of the appeal, provided that the insurer should cause the papers to be printed and entered in the Supreme Judicial Court for the Commonwealth on or before May 8, 1918, and that, if requested by the dependent widow, the appeal should be submitted on briefs on or before May 20, 1918, for

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determination by the full court. The dependent widow appealed from the order.

The case was submitted on briefs.

H. S. Avery, for the insurer.

R. H. Smith & W. G. Thompson, for the dependent widow.

RUGG, C. J. The material facts disclosed by the pleadings in these records are that Daniel E. Dempsey was an employee of T. Owen Tully, who was a subscriber under the workmen's compensation act. The employee received mortal injuries in the course of and arising out of his employment on November 2, 1916. The widow of the employee and the insurer thereafter entered into an agreement for compensation under the act, a memorandum of which was filed with, and on May 17, 1917, approved by, the Industrial Accident Board, and no appeal was taken therefrom. St. 1911, c. 751, Part III, § 4, as amended.

Payments were made in accordance with the terms of that agreement up to August 9, 1917, when the insurer, without the assent of the dependent or the employee, and without the approval of the Industrial Accident Board, St. 1916, c. 90, ceased to make payments. The dependent thereupon filed in the Superior Court a petition with appropriate allegations setting forth a copy of the agreement and of the approval of its terms by the Industrial Accident Board, and praying for the entry of a decree and the issuance of an execution for the payments due under the agreement. St. 1911, c. 751, Part III, § 11, as amended by St. 1912, c. 571, § 14, and St. 1917, c. 297, § 7. A decree was entered in accordance with the petition and execution ordered. The insurer claimed an appeal in due form. The insurer then filed in the Supreme Judicial Court a petition alleging in substance that it had entered into the agreement and had made the payments until August 8, 1917, when for the first time its attention was called to the judgment in *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, decided in May, 1917, which it interprets as holding that the workmen's compensation act has no bearing upon accidents occurring on navigable waters; that the mortal injury to the deceased employee occurred upon the steamship Devonian while lying at the wharf in the navigable waters of Boston Harbor, and that hence it was not liable under the act, and praying that the decree of the Superior Court be suspended until the merits of its contentions could be decided by this court.

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There was no error of law in the conditional order of the single justice suspending the decree of the Superior Court under St. 1915, c. 132. That statute provides in effect that orders and decisions of the Industrial Accident Board and decrees of the Superior Court, decisions of the arbitration committee from which no appeal has been taken, and agreements approved by the board, shall have effect notwithstanding appeal unless otherwise ordered by a justice of this court. It is a strong exercise of legislative power to compel a party to pay out money upon an alleged obligation which is contested and undecided by an authoritative adjudication. The manifest purpose of the statute is to confer upon the single justice jurisdiction to suspend, co-extensive with the mandate to comply with, the operations of the act before their validity has been finally established. The entry of the order rested in the discretion of the single justice. *Massachusetts Bonding & Ins. Co.* v. *Peloquin*, 225 Mass. 30.

The main contention of the insurer is that it was decided in *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, to be beyond the power of the several States to enact a workmen's compensation act applicable to injuries occurring upon navigable waters, because under the Constitution of the United States they are governed by maritime law and are cognizable only under admiralty jurisdiction, and that since the injury to the deceased employee occurred on a steamship afloat in navigable waters, the insurer was not liable under the workmen's compensation act. That contention, however, is not open to the insurer in this proceeding. It had no right to appeal from the decree of the Superior Court. The workmen's compensation act has a procedure all its own, as has been pointed out in earlier decisions. *Gould's Case*, 215 Mass. 480. Its provisions are explicit that there can be no appeal from a decree of the Superior Court entered upon a memorandum of agreement approved by the board. The pertinent words of Part III, § 11, of the act, as amended, are that a decree of the Superior Court shall have the same effect and "all proceedings in relation thereto shall thereafter be the same as though rendered in a suit duly heard and determined by said court, except that there shall be no appeal therefrom . . . where the decree is based upon . . . a memorandum of agreement." These words are definite and plain. They leave no room for doubt or discussion. The act

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makes no provision for appeal from a decree of the Superior Court, such as here was entered. The case in this respect is governed by *Hazel Young's Case*, 218 Mass. 346, 353, 354. The reasoning of that opinion is equally applicable to the situation here disclosed.

The insurer urges that the act gives efficacy to an agreement of settlement approved by the Industrial Accident Board "only when the terms conform to the provisions of" the act, Part III, § 4, as amended by St. 1912, c. 571, § 9, and that this agreement by reason of the decision of *Southern Pacific Co.* v. *Jensen*, *ubi supra*, does not conform to the act. This is only another form of statement of the contention that it is seeking review of the decree of the Superior Court by way of appeal, which cannot be done. The merits of that decree cannot be examined in this procedure. This does not appear, however, to be a proceeding prosecuted without reasonable ground within Part III, § 14 of the act.

It follows that the order of the single justice must be affirmed and that the insurer's appeal from the decree of the Superior Court must be dismissed.

So ordered.

CATHERINE J. WOOD *vs.* JAMES J. DANAS & another.

Middlesex. December 5, 1917. — June 26, 1918.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Negligence, Employer's liability, Assumption of risk. *Practice, Civil*, Report.

Although, where an employee reports to his employer or to a suitable servant or agent of his a defect in the ways, works or machinery of the employer, which was in existence and was open and obvious when he entered upon his employment, and the defect is not remedied within a reasonable time, St. 1909, c. 363, because the defect was not one as to which the employer or his servant or agent owed to the employee any duty of repair, does not operate to make the risk of injury from such defect any the less one assumed by the employee, yet, if, when the employee gives the notice as to such a defect to his employer, he insists upon its being made safe and the employer makes a promise to remedy it in such terms as to amount to a new contract of employment whereby the employee agrees to continue in the employment for a new period of service and the employer agrees to remedy the defect, and the defect is not remedied and the employee is injured by reason thereof, the statute becomes applicable and the employee will not be held to have assumed the risk of injury from the defect.

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At the trial of an action by a woman against two defendants, who were manufacturers, for personal injuries caused by a fall due to a missing tread of one of a flight of steps that she was required to use, it appeared that the defect existed and was obvious when she entered upon her employment, and she testified "that one day, about a month before the accident, just after coming down the steps, she had had a talk with" one of the defendants "in which she had reported to him that the step was missing, and he had replied that he was going to fix those steps for her." It did not appear whether the plaintiff was hired for any fixed period nor when she was paid. *Held*, that it must be inferred that the plaintiff's employment could be terminated at will, and that, upon the evidence, the jury might find that a new contract of service was made, the plaintiff agreeing to continue in the employ for a new term of service and the defendants agreeing to put the stairway in a safe condition.

In a report of the action above described to this court for determination, the presiding judge stated, "On the foregoing evidence, subject to the plaintiff's exception, I ruled that the plaintiff had assumed the risk of injury from said defective stairs, and that the provisions of St. 1909, c. 363, . . . do not apply to risks arising from defects existing in the premises at the commencement of the employment, but only to risks subsequently arising; and thereupon, at my direction, the jury returned a verdict for the defendants, and, by consent of the parties, I report the case for determination by the full court, with the stipulation that, if my ruling was correct, judgment is to be entered for the defendants with costs, and if my ruling was incorrect, judgment is to be entered for the plaintiff against the defendants for the sum of $200 and costs." *Held*, that the report was broad enough to raise the question of the impropriety of the ruling of the judge, due to the fact that there was evidence upon which the jury might have found that a new contract of employment for a new period was entered into which made the statute in question applicable; and that therefore, the ruling being improper, judgment should be entered for the plaintiff.

TORT for personal injuries, received on March 11, 1916, while the plaintiff was in the defendants' employ and caused by her falling backward down a flight of stairs because a step, which was below her, was missing therefrom. Writ dated March 25, 1916.

In the Superior Court the case was tried before *Morton*, J. The material evidence is described in the opinion. At the close of the evidence, the judge ordered a verdict for the defendants and reported the case to this court for determination, stating in the report, "On the foregoing evidence, subject to the plaintiff's exception, I ruled that the plaintiff had assumed the risk of injury from said defective stairs, and that the provisions of St. 1909, c. 363, to the effect that an employee does not assume the risk of defects reported and not remedied within a reasonable time, do not apply to risks arising from defects existing in the premises at the commencement of the employment, but only to risks subsequently arising; and thereupon, at my direction, the jury

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returned a verdict for the defendants, and, by consent of the parties, I report the case for determination by the full court, with the stipulation that, if my ruling was correct, judgment is to be entered for the defendants with costs, and if my ruling was incorrect, judgment is to be entered for the plaintiff against the defendants James J. Danas and Charles Danas for the sum of $200 and costs."

St. 1909, c. 363, is as follows:

"Section 1. If a defect in the ways, works or machinery of a person, partnership or corporation has been reported to the person whose duty it is to remedy said defect, or cause it to be remedied, or to report its existence, and such defect is not remedied within a reasonable time, and by reason of said defect an employee is injured, such employees shall not be held to have assumed the risk of such injury.

"Section 2. This act shall take effect on the first day of January in the year nineteen hundred and ten."

The case was argued at the bar in December, 1917, before *Rugg*, C. J., *Braley*, *Crosby*, *Pierce*, & *Carroll*, JJ., and afterwards was submitted on briefs to all the justices.

F. M. Qua, (*S. E. Qua* with him), for the plaintiff.

B. Silverblatt, for the defendants.

CARROLL, J. The plaintiff entered the defendants' employ in November, 1915. She was injured March 11, 1916. In the room where she worked there was a flight of steps which she had been directed by the defendants to use. "The tread of one of said steps near the bottom was missing," she was injured by reason of this defect, which existed when she began to work for the defendants and which was open and obvious.

The plaintiff testified, that about a month before the injury complained of, she reported to the defendant Charles Danas that the step was gone, and he replied "he was going to fix those steps for her;" that several weeks before the accident she complained to the defendant James J. Danas of the condition of the steps and he made no reply.

It appeared that "no person in the employ of the defendants other than the defendants themselves . . . had charge of remedying defects, if any, in the ways, works or machinery, or caused the same to be remedied, or reported their existence." The defendants

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were not subscribers under the workmen's compensation act. St. 1911, c. 751.

The report of the presiding judge states that the plaintiff assumed the risk and that St. 1909, c. 363, does not apply to risks arising from defects existing at the commencement of the employment, "but only to risks subsequently arising." The jury were directed to return a verdict for the defendants, "and by consent of the parties" the case was reported "for determination by the full court, with the stipulation that, if my ruling was correct, judgment is to be entered for the defendants with costs, and if my ruling was incorrect, judgment is to be entered for the plaintiff against the defendants James J. Danas and Charles Danas for the sum of two hundred dollars ($200) and costs."

When St. 1909, c. 363, was enacted, it was the law in this Commonwealth that, as to risks which arose subsequently to the time of employment, it was generally a question of fact for the jury whether the employee, knowing and appreciating the danger, voluntarily assumed it, *Fitzgerald* v. *Connecticut River Paper Co.* 155 Mass. 155, *Mahoney* v. *Dore,* 155 Mass. 513, *O'Maley* v. *South Boston Gas Light Co.* 158 Mass. 135; and in some cases the plaintiff was precluded from recovering, as matter of law, where he knew and appreciated the risk which came into existence after the employment began and voluntarily exposed himself to the danger. *Goddard* v. *McIntosh,* 161 Mass. 253. *Larkin* v. *New York Central & Hudson River Railroad,* 166 Mass. 110. *Tenanty* v. *Boston Manuf. Co.* 170 Mass. 323. *Davis* v. *Forbes,* 171 Mass. 548. It had also been decided, where a machine upon which a servant is employed becomes dangerous or defective, and he complains of the defect and is promised it will be remedied, but is injured before it is remedied and while he is reasonably expecting the promise to be performed that the promise is a circumstance to be considered by the jury in deciding whether he has assumed the risk in the meantime. Under this rule it was essential for the plaintiff to show that he continued at work in reliance upon the promise to repair. *Counsell* v. *Hall,* 145 Mass. 468. *Lewis* v. *New York & New England Railroad,* 153 Mass. 73. *Lamson* v. *American Axe & Tool Co.* 177 Mass. 144. *Daily* v. *Fiberloid Co.* 186 Mass. 318. See *Lynch* v. *M. T. Stevens & Sons Co.* 187 Mass. 397; *Gregory* v. *American Thread Co.* 187 Mass. 239. The statute was enacted

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to remedy the wrong thought to exist in the law; it took away the defence of the assumption of the risk arising from dangers or defects which came into existence subsequently to the contract of service, if reported as required by the statute. As to such defects it was no longer a question of law or a question of fact whether the employee assumed the risk, the statute entirely abolished this defence, when defects were properly reported, both at common law and under the employers' liability act. R. L. c. 106, §§ 71–79. Nor was the employee, under this statute, required to show that there was a promise to repair the defective appliance or that he relied on this promise; if the defect complained of was not remedied within a reasonable time no question of the assumption of the risk was involved.

It was well understood that there was also a contractual assumption of the risk, — an implied agreement to take the risk of conditions which were obvious, open and plain to be seen, and existing at the time the employment began. And although it is generally said that the employee assumes the risk of such conditions, "It is more accurate however to say that an employer is under no duty to an employee to change the obvious condition of the building in which the employee accepts employment." *Shannon* v. *Willard*, 201 Mass. 377, 380. The duty of the master applies not only to the machinery and appliances, but also to the way or method in which the employer's work was carried on. The employer had the right to carry on his business in his own way, although the machinery and appliances in use might be improved and a safer method adopted. In such cases there was no negligence in continuing conditions as they were when the contract was made, and there was no legal duty resting on the employer to change these conditions or to make them safer, even if they could be found to constitute defects. When an employee was injured, the burden was not upon the defendant to show that the plaintiff's injury came from a danger he contracted to assume, the burden was upon the plaintiff to show that he was not injured by reason of such danger, see *Cullalucca* v. *Plymouth Rubber Co.* 217 Mass. 392, and cases cited, and that his injury resulted from the employer's breach of duty. "So far as risks are obvious pertaining to the apparently permanent features of the business as it is openly conducted, an employer has a right to believe that his

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employee agrees to assume them . . . and the employer cannot be held guilty of negligence in failing to make provision against them." *Murch* v. *Wilson's Sons & Co.* 168 Mass. 408, 411. That no duty was upon the employer to change existing conditions, and that there was a contractual assumption of the risk arising from them, see *Fitzgerald* v. *Connecticut River Paper Co. supra; Mahoney* v. *Dore, supra; O'Maley* v. *South Boston Gas Light Co. supra; Gleason* v. *New York & New England Railroad,* 159 Mass. 68; *Content* v. *New York, New Haven, & Hartford Railroad,* 165 Mass. 267; *Kenney* v. *Hingham Cordage Co.* 168 Mass. 278; *Wood* v. *Tileston & Hollingsworth Co.* 182 Mass. 449; *Arnold* v. *Harrington Cutlery Co.* 189 Mass. 547; *Burke* v. *Davis,* 191 Mass. 20; *Butler* v. *Frazee,* 211 U. S. 459. On the other hand an obligation was assumed by the master to use proper care in providing and keeping the machinery and appliances in the same condition they were in, or appeared to be in, at the time of the employment; and although in some respects this duty might be delegated, under such circumstances it was generally a question of fact for the jury whether the servant assumed the risk. *Moynihan* v. *Hills Co.* 146 Mass. 586. *Murphy* v. *Marston Coal Co.* 183 Mass. 385.

The statute we are considering did not abolish every assumption of the risk; the words of the statute expressly limited it to the dangers of the employment arising from defects where there was a duty to remedy them or cause them to be remedied. It made no reference to conditions assumed by the employee as a part of his contract, where there was no duty to change them or make them safer, either at common law or under the employers' liability act; and such risks were excluded from the operation of the statute. It had reference to defects reported to one "whose duty it is to remedy said defect, or cause it to be remedied, or to report its existence." It was not the intention of the Legislature to require the adoption of safer methods or the installation of more improved machinery, on the complaint of the employee, independently of the length of time the method or machinery had been in use. Nor did the Legislature impose an obligation not already existing at law, either to remedy the defect or "report its existence" requiring the employer to keep the ways, works and machinery in a condition not contemplated when the contract of employment began. The statute was intended to apply to risks which were not

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understood by the employee to be assumed by him, — dangers which were hidden or concealed or which arose subsequently to his employment — and where the employer was under an obligation to use reasonable care to instruct him sufficiently, or to care properly for the machinery, so that the employee might perform his labor in a reasonably safe place. See in this connection *Ashton* v. *Boston & Maine Railroad*, 222 Mass. 65; *Cross* v. *Boston & Maine Railroad*, 223 Mass. 144, 146, 147; *Bernabeo* v. *Kaulback*, 226 Mass. 128. The statute cannot be construed as restricting the obligation to remedy defects to a servant or agent of the employer, whose business it was as such to make repairs or report the existence of defects. It was an enactment excluding the defence of the assumption of the risk where the obligation imposed by law upon the employer to keep the ways, works and machinery in a reasonably safe condition had not been observed, although the particular duty might at common law be delegated to a fellow servant.

By the implied term of the contract of service which governed the relations of the parties the defendants were not required to change the obvious conditions of employment existing when the contract of service began. See *McCafferty* v. *Lewando's French Dyeing & Cleansing Co.* 194 Mass. 412. It might be found, however, that this implied term of the contract was modified by a subsequent arrangement. The plaintiff testified "that one day, about a month before the accident, just after coming down the steps, she had had a talk with the defendant Charles Danas, in which she had reported to him that the step was missing, and he had replied that he was going to fix those steps for her." On this evidence the jury could say, that the plaintiff no longer agreed that the defendants owed her no duty respecting the manifest danger but insisted that the place should be made safe, and that the employer assented to this and agreed to make the repair; that is to say, the parties by mutual agreement changed what had been an implied term of the contract into an express term by which the stairs were to be made safe.

The record does not show that the plaintiff was hired by the day, week or month, or for a fixed period of service; nor does it appear when she was paid; neither is there evidence from which it could have been inferred that she was hired for a definite time. See *Maynard* v. *Royal Worcester Corset Co.* 200 Mass. 1, 5; *Frati* v. *Jan-*

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nini, 226 Mass. 430, 433. As the record is silent on this question it must be considered that the hiring was not for a definite time and at least could be terminated at will. This being so, in the opinion of a majority of the court, from the complaint made by the plaintiff and the defendants' promise to repair and the plaintiff's continuation in the defendants' employ, the jury could say that a new contract of service was made by which the defendants were to repair the stairway which the plaintiff was to use in the course of her employment, and to make it safe; and it could have been found that there was a valid consideration for this new contract of employment, in the mutual promises of the parties, — the plaintiff having agreed to continue in the employment for a new period of service, the defendants agreeing to put the stairway in a safe condition.

If the plaintiff's testimony was believed, she reported the condition of the steps to a person "whose duty it is to remedy said defect, or cause it to be remedied," (St. 1909, c. 363, § 1,) who by the express contract, modifying the original contract of employment agreed to make the place safe and remedy the condition of the stairs. At common law the plaintiff could not recover on the strength of such a promise unless she satisfied the jury she relied upon the promise to make the repair, see *Counsell* v. *Hall, supra, Lamson* v. *American Axe & Tool Co. supra, Daily* v. *Fiberloid Co. supra*, but, as we construe the statute, where a duty to repair is expressly assumed and the defect is reported, although this obligation to repair is agreed to when report is made, the plaintiff may recover without evidence showing that she continued at work in reliance upon the promise to repair.

We think the terms of the report are broad enough to raise this question. Because this express agreement to repair the steps placed upon the defendants the duty to make them reasonably safe, the statute does apply, and the case should have been submitted to the jury. According to the report judgment is to be entered for the plaintiff against the defendants James J. Danas and Charles Danas for the sum of $200 and costs; and it is

So ordered.

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C. L. TODD & others, trustees, *vs.* TRADERS & MECHANICS INSURANCE COMPANY.

SAME *vs.* WORCESTER MUTUAL FIRE INSURANCE COMPANY.

SAME *vs.* QUINCY MUTUAL FIRE INSURANCE COMPANY.

SAME *vs.* MIDDLESEX MUTUAL FIRE INSURANCE COMPANY.

SAME *vs.* HOLYOKE MUTUAL FIRE INSURANCE COMPANY.

SAME *vs.* DORCHESTER MUTUAL FIRE INSURANCE COMPANY.

Middlesex. March 14, 1918. — June 26, 1918.

Present: DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Insurance, Fire. *Negligence*, As defence to action upon policy of fire insurance, Violation of statute. *Fire.*

Where, in an action upon a policy of fire insurance, it appeared that the buildings insured were destroyed by a fire which was communicated from a fire set more than fifty feet from the buildings by the insured, who had violated the provisions of St. 1911, c. 244, § 1, in failing to procure the permit required by that statute before starting the fire, it was *held*, that it would have been improper to order a verdict for the defendant, there having been questions for the jury, whether the violation of the statute in failing to procure the permit was a negligent act of the insured which was a proximate cause of the loss, and, if so, whether the negligence was of such a character as to bar recovery on the policy.

Mere negligence on the part of one insured against loss by fire does not prevent recovery on the policy, it being one of the objects of insurance to protect the insured from loss due to carelessness.

SIX ACTIONS OF CONTRACT upon policies of fire insurance. Writs dated July 23, 1915.

A defence set up in the answers was "that the plaintiffs' unlawful act contributed to their loss, namely, that they did either personally or through their agents cause a fire to be built upon said premises without first having obtained a permit to do so, the same being in violation of St. 1911, c. 244, and that the plaintiffs are therefore estopped from recovering under said contract of insurance."

The actions were tried together before *Bell*, J. The material evidence is described in the opinion. At the close of the evidence, the defendants moved that verdicts be ordered in their favor. The

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motions were denied and the defendants excepted. The bill of exceptions stated that, "The cases were thereupon submitted to the jury upon certain issues framed by the court. Answers to these questions were returned by the jury upon which the judge ordered verdicts for the plaintiffs."

The bill of exceptions did not state what the "certain issues" which were submitted to the jury were, nor what the jury's answers were.

The jury found for the plaintiffs against the Traders and Mechanics Insurance Company in the sum of $231.02; against the Worcester Mutual Fire Insurance Company in the sum of $343.28; against the Quincy Mutual Fire Insurance Company in the sum of $807.73; against the Middlesex Mutual Fire Insurance Company in the sum of $798.68; against the Holyoke Mutual Fire Insurance Company in the sum of $553.96; against the Dorchester Mutual Fire Insurance Company in the sum of $1,107.92. The defendants alleged exceptions.

H. Williams, Jr., (*J. P. Manning, Jr.*, with him,) for the defendants.

J. G. Palfrey, for the plaintiffs.

De Courcy, J. These are six actions upon fire insurance policies, in the Massachusetts standard form, to recover for loss or damage by fire. The plaintiffs owned the premises as trustees under the will of George G. Tarbell, deceased; and the plaintiff Tarbell was the sole beneficiary. The buildings insured consisted of a dwelling-house, barn and shed, situated in the town of Lincoln. It appears that about one hundred feet back from the barn and extending parallel with it was a raspberry bed a few feet wide. Along the side of the bed away from the barn was a two foot grass path; and beyond this was a garden patch, about seventy by one hundred feet in size.

On March 13, 1915, Mr. Tarbell and his wife drove over to the premises, from Winchester, and he spent most of the afternoon working on the raspberry bed, "raking it over and cleaning out loose ends, etc." A question arose with reference to the grass path, and some discussion as to whether it would be better to burn it over rather than rake it. To Mrs. Tarbell's question "Would n't you scorch the raspberries?" he said "I don't believe so; let us go and see." He further testified, "I took a match and

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when I lit the match the grass was hanging over into the bed and I lit the grass hanging over into the bed to see if it would scorch the raspberries." Flames flared up and Mr. Tarbell, being satisfied with his experiment, stamped them out. Then, looking up, he saw a little flame starting fifteen or twenty feet the other side of the raspberry bed. He summoned help to his assistance, and they used every effort to extinguish the fire; but when the fire department arrived ten minutes later the barn was on fire.

The contention of the defendants is that the plaintiffs cannot recover on the policies because the fire was started by Mr. Tarbell in violation of St. 1911, c. 244, § 1, which strikes out § 1 of St. 1908, c. 209, and substitutes therefor the following: "It shall be unlawful within any city, or within any town which accepts the provisions of this act, for any person to set a fire in the open air between the first day of March and the first day of December except by the written permission of the forest warden, or the chief of the fire department or, in cities that have such an official, the fire commissioner: provided, that debris from fields, gardens and orchards, or leaves and rubbish from yards may be burned on ploughed fields by the owners thereof, their agents or lessees; and provided, further, that persons above eighteen years of age may maintain a fire for a reasonable purpose upon sandy or barren land, if the fire is enclosed within rocks, metal or other non-inflammable material. In every case such fire shall be at least two hundred feet distant from any forest or sprout lands, and at least fifty feet distant from any building, and shall be properly attended until it is extinguished. The forest warden shall cause public notice to be given of the provisions of this section, and shall enforce the same. Whoever violates the provisions of this section shall be punished by a fine of not more than one hundred dollars, or by imprisonment for not more than one month, or by both such fine and imprisonment."

It is undisputed that the town of Lincoln had duly accepted this statute; and that Mr. Tarbell had no "written permission." Although the meagre bill of exceptions does not disclose the special questions which were submitted to the jury, and does not purport to contain all the material evidence, we assume that the fire was not set on "ploughed fields," within the meaning of the statute; and that the question whether said violation of the statute pre-

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vents a recovery on the policies as matter of law, is open to the defendants on their motions for directed verdicts.

In actions of tort, (where the question generally arises,) while a plaintiff cannot obtain the aid of a court to relieve him from the direct consequence of his own illegal act (see *Banks* v. *Highland Street Railway*, 136 Mass. 485, *Brunelle* v. *Lowell Electric Light Corp.* 188 Mass. 493), the mere fact that he was violating a statute or ordinance when injured does not necessarily prevent his recovery. Such violation is considered "evidence of negligence" on the part of the violator, as to all consequences that the statute was intended to prevent. *Bourne* v. *Whitman*, 209 Mass. 155, 167. *Berdos* v. *Tremont & Suffolk Mills*, 209 Mass. 489. If, however, his violation of law was merely a condition or an attendant circumstance of his injury, and not a proximate contributing cause, he may recover from the wrongdoer. *Newcomb* v. *Boston Protective Department*, 146 Mass. 596. For instance, in *Moran* v. *Dickinson*, 204 Mass. 559, it was held that a boy less than sixteen years of age, who was injured by reason of a defect in an elevator which he was operating in violation of a statute, was entitled to go to the jury. The plaintiff in *Damon* v. *Scituate*, 119 Mass. 66, was travelling on the wrong side of the road in violation of the statute, when injured by a defect in the way. It was held in *Biggio* v. *Boston*, 179 Mass. 356, that the plaintiff was not precluded from recovering for the flooding of his cellar by the fact that he had constructed it below the grade required by law. In *McCarthy* v. *Morse*, 197 Mass. 332, 337, where the plaintiff was knocked off a temporary bridge which he had erected, it was said, "the illegal act of the plaintiff in being engaged upon this work without a permit was not necessarily the direct and proximate cause of his injury, nor was he obliged to found his action upon his own violation of law." And see *Farrell* v. *Sturtevant Co.* 194 Mass. 431; *Driscoll* v. *Boston Elevated Railway*, 223 Mass. 533.

Mere negligence on the part of the insured does not prevent recovery on a policy of insurance. One of the objects of insurance is to protect the insured from loss due to carelessness. In *Johnson* v. *Berkshire Mutual Fire Ins. Co.* 4 Allen, 388, it was held that the insured could recover for the loss by fire of his barn and contents, where he had lighted some straw under the barn in order to smoke out bees, and the fire rapidly spread and destroyed the property.

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On the other hand the insurer is not liable for a fraudulent loss, due to the intentional destruction of property by the insured, or to such reckless and inexcusable negligence as tends to show a fraudulent purpose or design. See cases collected in 6 Ann. Cas. 587, note, and 17 L. R. A. (N. S.) 189, note. *Chandler* v. *Worcester Mutual Fire Ins. Co.* 3 Cush. 328. *Davis* v. *Royal Arcanum*, 195 Mass. 402. *Hatch* v. *Mutual Life Ins. Co.* 120 Mass. 550 (where there was a special provision in the policy applicable).

In the present case, it is not contended that Mr. Tarbell had any fraudulent purpose or design in setting fire to the grass. Although he was guilty of a violation of the statute in not obtaining a permit, it was not necessary for him and his co-trustees to rely on that violation in making out their *prima facie* case. His transgression of the statute made him liable to a criminal prosecution. But the Legislature expressed no intention to make him also civilly liable to persons suffering special damage from his act, — a familiar provision in penal statutes dealing, for instance, with intoxicating liquors. See R. L. c. 100, § 62. *O'Connell* v. *O'Leary*, 145 Mass. 311. The defendants ask us, in effect, to read into this statute what the Legislature has seen fit to omit, namely, a provision that a statutory violation shall create a civil liability on the part of the violator, or deprive him of his civil rights. As was said by Knowlton, C. J., in *Bourne* v. *Whitman*, 209 Mass. 155, 169: "The fact that the number of punishable misdemeanors has multiplied many times in recent years, as the relations of men in business and society have grown complex with the increase of population, is a reason why the violation of a criminal statute of slight importance should not affect one's civil rights, except when this violation, viewed in reference to the element of criminality intended to be punished, has had a direct effect upon his cause of action." In accordance with our law Mr. Tarbell's violation of the statute may be considered as "evidence of negligence." The illegal element of his conduct was the lack of a permit; and it was a question of fact for the jury whether this was a contributing cause or merely a condition of the loss. The jury might well say that the loss would have happened if in fact he had a permit; or that the loss really was due to his misjudgment or carelessness in caring for the fire after it was set.

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The damage by fire to the buildings of the plaintiffs was a lawful risk which was covered by the policies issued by the defendants. The burden was on them to show that they were relieved from liability by the acts of Mr. Tarbell.

For the reasons already stated, and in the absence of any authority to the contrary, we are of opinion that on the facts disclosed the plaintiffs were permitted to go to the jury rightly.

Exceptions overruled.

DANIEL CASHMAN'S CASE.

Suffolk. March 14, 15, 1918. — June 26, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Workmen's Compensation Act, Who is employee, Terms of policy.

In a claim for compensation under the workmen's compensation act for an injury by a heavy weight falling on the claimant's leg while he was superintending the moving of machinery to be set up in a factory, it appeared that the work was being done by a corporation, of which the claimant was the president and a director and the owner of one half of its capital stock. The corporation carried on the business of a partnership, consisting of the claimant and his brother. The claimant's brother was the treasurer of the corporation and owned the other half of the capital stock. A policy of insurance under the workmen's compensation act insured the brothers both as a corporation and as individuals. The policy provided that "If the subscriber is a corporation, the remuneration of the president . . . actually engaged . . . in the personal superintendence of, the manual or mechanical operations" should not be included in the insurance unless such president's "entire remuneration is included in the declarations hereinafter contained and upon which the premium for this policy is computed." The remuneration received by the claimant was excluded in determining the amount of the premium. The policy had been taken out by the claimant's brother as treasurer of the corporation, and the remuneration of the claimant and his brother had been expressly excluded upon their representation "that they were practically a partnership and owned practically all the business." The Industrial Accident Board found that the claimant was an employee and that "the fact that the insurer, for any reason, did not include the earnings of the claimant in its payroll audit, has no bearing upon the rights of the claimant as an employee." An award was made by the board, which was affirmed by a decree of the Superior Court. *Held,* that the decree must be reversed and a decree entered in favor of the insurer, because, assuming that the claimant was an employee of the corporation of which he was the president, his remuneration not being included in the payroll on which the premium was based, his injury was not covered by the policy.

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APPEAL to the Superior Court under St. 1911, c. 751, Part III, § 11, as amended by St. 1912, c. 571, § 14, from a decision of the Industrial Accident Board awarding compensation to Daniel Cashman as an employee of Cashman Brothers Company, a corporation, for an injury received on May 5, 1916, by an eight ton weight falling on his leg when a chain parted in the course of the work of moving machinery to be set up in the factory of Gray and Davis, Incorporated, at Amesbury.

The case was heard by *J. F. Brown*, J. The evidence is described in the opinion. The judge made a decree in accordance with the decision of the Industrial Accident Board ordering the insurer to pay to Daniel Cashman the sum of $1,015.71 and the further sum of $10 per week from and after May 16, 1917, to the date of the decree, and after the date of the decree such payment of $10 per week to continue until and unless reviewed and altered by the Industrial Accident Board, the total sum paid not to exceed $4,000. The insurer appealed.

L. C. Doyle, for the insurer.

P. I. Lawton, for the employee.

CARROLL, J. Daniel Cashman, while superintending the moving of the machinery of the plant of Gray and Davis, at Amesbury, was injured by a heavy weight falling on him, when the chain which held it parted. The work was done by Cashman Brothers Company, a corporation of which the claimant was the president and a director, and of whose capital stock he owned twenty-five shares; his brother, Michael Cashman, was its treasurer and a director, and owned twenty-four shares; the remaining one share was held by their counsel. The policy of insurance under the workmen's compensation act, insured the Cashman brothers both as a corporation and as individuals. The policy provided if the subscriber was a corporation "the remuneration of the president, any vice-president, secretary or treasurer not actually engaged in connection with, or in the personal superintendence of, the manual or mechanical operations described in such declarations need not be included." The remuneration received by the claimant was excluded in determining the amount of the premium. The Industrial Accident Board found that Daniel Cashman was an employee, and "the fact that the insurer, for any reason, did not include the earnings of the claimant in its payroll audit, has no

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bearing upon the rights of the claimant as an employee." Compensation was awarded him.

Assuming, but not deciding, that Daniel Cashman might have been found to be an employee under the workmen's compensation act, when he was injured he was engaged in the "personal superintendence, of the manual or mechanical operations" of the corporation. The premium paid was based on the payroll in which his remuneration was not included, and, as he was not within the terms of the policy, he cannot recover.

The business of Cashman Brothers Company was conducted as a partnership. There was evidence that before the issuance of the policy other policies under the workmen's compensation act had been taken out in the name of the corporation, in which the income received by the Cashmans had not been included. Michael Cashman had charge of the financial affairs of the concern, and the greater part if not all of the conversation regarding the policies was between him and the agents of the insurer. The remuneration of Michael and that of his brother were expressly excluded because of their objection and representation, their reason being "that they were practically a partnership and owned practically all the business." Under these circumstances the claimant, who was the president and a director of the corporation and the owner of half of its capital stock, must be presumed to have assented to the contract of insurance made by the treasurer of the corporation who also owned half of its capital stock.

The policy by its express terms does not cover the president while doing the work which Daniel Cashman was doing when injured. The policy provided, "This agreement shall apply only to such injuries so sustained by any person or persons in the service of the subscriber under a legal contract of hire express or implied, oral or written and whose entire remuneration is included in the declarations hereinafter contained and upon which the premium for this policy is computed; such injuries being sustained by reason of the business operations described in said declarations conducted at the places and in the manner therein described. If the subscriber is a corporation, the remuneration of the president, any vice-president, secretary or treasurer not actually engaged in connection with, or in the personal superintendence of, the manual or mechanical operations described in such declarations need not

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be included, this policy covering such officers nevertheless." The interpretation of this clause under the circumstances here disclosed is that a president, vice-president, secretary or treasurer, who is injured while actually engaged in the manual or mechanical operations of the corporation, is not included as a beneficiary under the policy, unless his remuneration has been included as the basis of the premium to be paid on the policy, and the workmen's compensation act cannot be construed so as to afford the claimant compensation contrary to this agreement.

While insured as an individual, he was an employer and could not claim compensation as an employee. Assuming he was an employee of the corporation of which he was the president, his remuneration not being included in the payroll, it would be manifestly unjust to require the insurer to pay him compensation. See in this connection *Monitor Mutual Fire Ins. Co.* v. *Buffam*, 115 Mass. 343. In *Cox's Case*, 225 Mass. 220, it was decided that with certain exceptions there mentioned, the workmen's compensation act does not permit an employer carrying on a business which is in substance one business, to become a subscriber as to one part of it and to remain a non-subscriber as to the rest. That case is not applicable to the case at bar. It follows that the decree must be reversed and a decree entered in favor of the insurer.

So ordered.

FAUSTINO P. DAVIS *vs.* GEORGE E. CUSTER.

Suffolk. March 21, 22, 1918. — June 26, 1918.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Practice, Civil, New trial.

A judge is not bound as a matter of law to grant a new trial because of newly discovered evidence which, if presented to a jury and believed by them, would warrant the reaching of a different result.

At the trial of an action of tort for malicious prosecution and false arrest, the plaintiff and his daughter testified that the plaintiff was arrested on a warrant, procured by the defendant, and was handcuffed and, while so handcuffed and on the way to the police station, met acquaintances. There was a verdict for the plaintiff. The defendant moved for a new trial, supporting his motion by affi-

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davits of three police officers that no handcuffs were used upon the plaintiff and that no one was met on the journey to the station except a police officer. The motion was denied. *Held*, that the denial could not be said to be an abuse of discretion, and that the exception must be overruled.

TORT, with a declaration as amended in three counts, the first count alleging malicious prosecution, the second false arrest and the third libel. Writ dated July 24, 1916.

The action was tried in the Superior Court before *J. F. Brown*, J. There was a verdict for the plaintiff in the sum of $500. The defendant filed a motion for a new trial on the ground of newly discovered evidence, described in the opinion. The motion was denied. The defendant alleged exceptions.

F. W. Mansfield, for the defendant.

C. J. Muldoon, Jr., (*J. J. O'Hare* with him,) for the plaintiff.

CARROLL, J. This is an action for malicious prosecution. There was a verdict for the plaintiff. The defendant moved for a new trial on the ground of newly discovered evidence. The plaintiff testified at the trial that when arrested he was handcuffed and taken from his home to the West Roxbury police station. His daughter testified, corroborating him, that while he was walking handcuffed with the officer she met "quite a few" people whom she knew. The alleged newly discovered evidence was based on the testimony of three police officers that no handcuffs were used and that during the walk to the station house they met no one except a police officer. The judge denied the motion.

The granting of a motion for a new trial ordinarily is a matter within the discretion of the trial judge, and we find nothing in this record to show an abuse of this discretion. A judge is not bound, as matter of law, to grant a new trial because of newly discovered evidence which if presented to a jury would warrant the reaching of a different result. *Powers* v. *Bergman*, 210 Mass. 346. *Manzigian* v. *Boyajian*, 183 Mass. 125.

Exceptions overruled.

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AGENCY.

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Where, at the trial of an action by an insurance solicitor against an insurance company upon a contract of employment entered into between the plaintiff and general agents of the defendant, it appeared that the company and a general agent both regarded the contract as binding upon the company, that its officers knew of the contract, that it paid the solicitor his commissions thereunder and that the company was the actor in discharging the solicitor and fixing the terms of his dismissal, findings of the judge were held to have been warranted that the company was liable upon the contract. *Elwell* v. *State Mutual Life Assurance Co.* 248.

Where a person is injured by ice falling upon him due to a defective condition of a building and dies within six days without notice thereof having been given in accordance with Sts. 1908, c. 305; 1913, c. 324, in his behalf to the person responsible for the condition of the premises resulting in the injury, a notice given five days after the death of the person so injured by an attorney at law acting on behalf of one who more than a month later was appointed administrator of the estate of the person so injured does not satisfy the requirements of the statute, even if the attorney's act is ratified by the administrator after his appointment. *O'Neil* v. *Squire*, 294.

At the trial of an action by an administrator against an express company for personal injuries and death of an employee of the defendant caused by a barrel falling upon him as he and a second man were loading it upon a truck, there was evidence that the barrel fell by reason of negligence of the second man and, it was held, the evidence warranted findings that the man whose negligence caused the injury and death of the plaintiff's intestate was at that time in the defendant's employ and acting within the scope of his employment. *Schlehuber* v. *American Express Co.* 347.

A Massachusetts corporation, organized, officered and controlled by a foreign corporation for the purpose of building an extension of the railroad of the foreign corporation through this Commonwealth, cannot be treated as the "*alter ego*" or agent of the foreign corporation when openly contracting for itself in its own name. *Marsch* v. *Southern New England Railroad*, 483.

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Scope of Authority or Employment.

Evidence at the trial of an action for personal injuries resulting from an accident caused by negligence of the driver of a motor vehicle, which tends merely to show that the defendant, who was not in the vehicle at the time of the accident, owned the vehicle and that the driver was in his general employ, is not sufficient to warrant a finding that at the time of the accident the driver was acting within the scope of his employment. *Gardner* v. *Farnum*, 193.

Further evidence which, it was held, did not warrant an inference that the chauffeur was upon an errand for the defendant nor that he was acting within the scope of his employment at the time of the accident. *Ibid.*

An attorney at law, retained to prosecute a petition for the enforcement of a mechanic's lien, has no authority, by reason of his general retainer, to bind his client by statements to a stranger as to the effect of an unrecorded bond to dissolve the lien. *Goldstein* v. *Tucker*, 259.

It was pointed out that, in assuming for the purposes of a decision that a statement of a clerk of an insurance company "that he would attend to" a change in the policy amounted to an agreement to make the change and also that the agents were authorized to make such a change, neither of these points was decided. *O'Neill* v. *Queen Ins. Co. of America*, 269.

Evidence at the trial of an action by the owner of a motor boat against a lighter company for personal injuries received while raising the stern of a tug for repairing, was held to warrant findings that employees of the defendant acted within the scope of their authority in undertaking at the request of the captain of the tug to hoist the stern of the tug for the purpose above described. *Collins* v. *Splane*, 281.

At the trial of an action by an administrator against an express company for personal injuries and death of an employee of the defendant caused by a barrel falling upon him as he and a second man were loading it upon a truck, there was evidence that the barrel fell by reason of negligence of the second man and, it was held, the evidence warranted findings that the man whose negligence caused the injury and death of the plaintiff's intestate was at that time in the defendant's employ and was acting within the scope of his employment. *Schlehuber* v. *American Express Co.* 347.

Representations, made by a clerk in the office of an attorney at law, that a release, which purported to be of all demands, referred only to damage to a muff by ice falling from a roof, were held to be binding upon the client and not to release him from liability for personal injuries caused by the same ice. *Connors* v. *Richards*, 436.

Act of a porter in the employ of an express company at a railroad station in drawing a loaded revolver from its holster, when he is resting at the stand of a bootblack, at the request of one of two bootblacks, was held not to have been in the course of his employment, so that a bootblack who was shot in the leg when the revolver was accidentally discharged could not maintain an action against the express company employing the porter for his injuries thus sustained. *Lamanna* v. *American Express Co.* 564.

What are injuries arising out of and in the course of the employment of a workman for which he is entitled to compensation under the workmen's compensation act, see appropriate subtitle under WORKMEN'S COMPENSATION ACT.

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Construction of Contract of Employment.

See appropriate subtitle under CONTRACT.

Liability of Agent on Contract.

Where a contract, made between an insurance solicitor and a firm who were general agents for an insurance company, was broken by the discharge of the solicitor, it was held that actions might be maintained both against the firm of agents and against the insurance company, although there could be but one satisfaction in damages. *Elwell* v. *State Mutual Life Assurance Co.* 248.

In an action against both a Massachusetts corporation and a foreign corporation for whom the Massachusetts corporation was alleged to be acting as an "*alter ego*" or agent, it was assigned as a ground of demurrer that there was a misjoinder of parties, and it was held that it was improper to join the Massachusetts corporation as the agent of a declared principal with itself as a principal in allegations of a joint undertaking with the defendant foreign corporation for which in the making of the contract with the plaintiff it was alleged to have acted as agent. *Marsch* v. *Southern New England Railroad*, 483.

Agent's Duty of Fidelity.

The mere fact, that an insurance solicitor advocated and sought legislation providing for a different form of endowment policy than that issued by a company by whose general agents he was employed, does not show disloyalty on his part warranting his discharge, where it appears that he honestly believed that the form of policy which he advocated, if adopted, would enure to the advantage not only of the insured but also of the company, and that his activities in this regard were known to the company. *Elwell* v. *State Mutual Life Assurance Co.* 248.

In a suit in equity by a dealer in white and manila paper against the former manager of the plaintiff's manila department and a corporation of which he had obtained control at the time that he severed his connection with the plaintiff, for an accounting, on findings made by a master it was held that there was no evidence to support allegations of fraud, conspiracy and breach of fiduciary duty contained in the plaintiff's bill and that the bill should be dismissed as against both defendants. *Lindsay* v. *Swift*, 407.

In a suit in equity brought by the trustees of a land trust against a bank to impress with a trust funds of the plaintiffs deposited with the defendant by a dishonest employee of the plaintiffs in his own name and afterwards wholly withdrawn and misappropriated by him, the dishonest employee has no interest in the subject matter of the suit and is not a necessary party. *Kendall* v. *Fidelity Trust Co.* 238.

Where a bank has had no actual or constructive notice of fraud or misdoing on the part of a treasurer, who is one of its depositors, if the bank acting in good faith merely credits deposits of checks, which it knows to have been drawn by the treasurer upon the funds of the principal, to the personal account of the treasurer, this does not make it liable to the principal if the treasurer afterwards misappropriates the deposit. *Ibid.*

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Agency (*continued*).

Ratification or Repudiation of Agent's Acts by Principal.

Failure of a customer of a stockbroker to repudiate improper sales by the stockbroker to himself of certain securities held by him for the customer on margin was held to have ratified the sales. *Hall* v. *Paine*, 62.

In an action of contract against a corporation for breach of a contract in writing whereby the defendant agreed to employ the plaintiff for a year, a contention by the defendant, that one, who purported to act in its behalf in making the contract with the plaintiff and afterwards in discharging the plaintiff, had no authority so to act, became immaterial where it appeared that the defendant by its letters and its conduct ratified such acts of its alleged agent. *Mills* v. *U. S. Slicing Machine Co.* 95.

Evidence at the trial of an action by the owner of a motor boat against a lighter company for personal injuries received while raising the stern of a tug for repairing, was held to warrant findings that employees of the defendant acted within the scope of their authority in undertaking at the request of the captain of the tug to hoist the stern of the tug for the purpose above described, and that, if their action in that regard originally was unauthorized, it afterwards was ratified by the company's officers, who, with full knowledge of the circumstances, presented and received payment of a bill for the work thus performed. *Collins* v. *Splane*, 281.

Officers and Agents of Corporations.

See appropriate subtitle under CORPORATION.

Employer's Liability.

See that subtitle under NEGLIGENCE.

Workmen's Compensation Act.

See that title.

Real Estate Broker.

See BROKER.

AMENDMENT.

See that subtitle under PRACTICE, CIVIL.

APPEAL.

See that subtitle under EQUITY PLEADING AND PRACTICE; PRACTICE, CIVIL; PROBATE COURT; WORKMEN'S COMPENSATION ACT.

ARCHITECT.

Letter of an architect, containing an acceptance of a building upon condition that the contractor was to remedy certain defects of workmanship or of materials, was held not of itself to be a final certificate under the provisions of a building contract, which could be treated as conclusive evidence of

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performance, although the contractor promptly performed the conditions named in the architect's letter. *Hennebique Construction Co.* v. *Boston Cold Storage & Terminal Co.* 456.

It was held that the certificate required by the provisions of the contract above referred to must be complete and must contain a statement in writing authenticated by the signature of the architect that the final payment, naming the amount, was payable to the contractor under the terms of the contract. *Ibid.*

Whether, under all the circumstances, the letter above described operated as a waiver of the right of the owner to insist upon the architect's final certificate, and, if it did so operate, whether the owner thereby was precluded from claiming in recoupment damages for defective workmanship or materials, were questions not raised by the record. *Ibid.*

ATTACHMENT.

What is Attachable.

Property impounded by order of a police court for the purposes of the prosecution of a complaint "until further order of said court" cannot be reached by trustee process until the impounding has been brought to an end by a further order of the court. *Wallace* v. *Coyne*, 475.

In order to reach such impounded property by an attachment on trustee process it is not enough to show that the proceedings in which the property was impounded have been disposed of and that the time has come to bring the impounding order to an end. *Ibid.*

It is necessary to show that the further order of the police court has been made which alone can terminate the impounding. *Ibid.*

The fact, that the district attorney who had charge of the prosecution in which the property was impounded was willing that the impounding should be ended, does not show that it has been ended. *Ibid.*

Whether property impounded by such an order of court is held by its custodian as a public officer who is accountable for it merely as such officer within R. L. c. 189, § 31, cl. 3, it here was not necessary to consider. *Ibid.*

Special Attachment.

The right to acquire a lien by special attachment under R. L. c. 167, §§ 38, 63, is a creature of statute, a right in its nature preliminary or subsidiary to the main question of liability involved in the action, and is not a natural right. *Shea* v. *Peters*, 197.

An attachment, upon a writ of original summons and attachment in an action at law, described by the attaching officer in his return as an attachment "specially" of "all the right, title and interest the" defendant had "in and to" certain real estate, which he described by metes and bounds, "the record title to which stands in the name of" a person other than the defendant, is an attachment made "on mesne process" within the provisions of the statutes above described. *Ibid.*

A wife, whose real estate, purchased by her with her own money, owned by her and standing of record in her own name, has been specially attached on mesne process in an action at law against her husband only, is "a person whose property has been attached" and as such is entitled to relief

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by dissolution of the attachment under the statutes above described. *Shea* v. *Peters*, 197.

Excessive or Unreasonable Attachment.

Both R. L. c. 167, § 110, and St. 1909, c. 190, relating to the reduction or dissolution of an excessive or unreasonable attachment, are remedial in their nature and designed to afford relief against conduct in its nature resembling abuse of the process of attachment; and their words should be construed in accordance with their manifest purpose in order to afford adequate redress for the evil against which they appear to be aimed. *Shea* v. *Peters*, 197.

R. L. c. 167, § 110, amended by St. 1909, c. 190, does not violate the right to trial by jury secured by the Constitution. *Ibid.*

Special attachment was held to be an attachment "on mesne process" under the provisions of the above statute. *Ibid.*

Defendant's wife, whose property had been attached specially, was entitled to relief under the above statute. *Ibid.*

Bond to dissolve Attachment or Lien.

See that subtitle under BOND.

ATTORNEY AT LAW.

Attorney's Authority.

Scope.

An attorney at law, retained to prosecute a petition for the enforcement of a mechanic's lien, has no authority, by reason of his general retainer, to bind his client by statements to a stranger as to the effect of an unrecorded bond to dissolve the lien. *Goldstein* v. *Tucker*, 259.

A statement of an attorney at law for a petitioner to enforce a mechanic's lien to a stranger, to the effect that the execution and delivery of a bond to dissolve the lien, which bond is unrecorded, dissolved the lien, is merely an expression of an opinion on a question of law, and, even if authorized by his client, will not operate to estop the client from prosecuting his lien. *Ibid.*

Where a person is injured by ice falling upon him due to a defective condition of a building and dies within six days without notice thereof having been given in accordance with Sts. 1908, c. 305; 1913, c. 324, in his behalf to the person responsible for the condition of the premises resulting in the injury, a notice given five days after the death of the person so injured by an attorney at law acting on behalf of one who more than a month later was appointed administrator of the estate of the person so injured does not satisfy the requirements of the statute, even if the attorney's act is ratified by the administrator after his appointment. *O'Neil* v. *Squire*, 294.

Representations, made by a clerk in the office of an attorney at law, that a release, which purported to be of all demands, referred only to damage to a muff by ice falling from a roof, were held to be binding upon the client and not to release him from liability for personal injuries caused by the same ice. *Connors* v. *Richards*, 436.

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Validity.

At the trial of issues framed in a suit in equity brought by an insurance company against one, insured by it against liability arising from accidents in which his motor vehicle was involved, and an attorney at law alleged to have been in collusion with the insured to defraud the plaintiff, to enjoin the insured from maintaining an action of contract upon the policy, instructions contained in the charge to the jury to the effect that the attorney had a legal right to represent the insured in matters unrelated to the action against him by the person who was injured in the collision with the motor vehicle and to represent the injured person in that action were held to contain no error. *Maryland Casualty Co.* v. *Jackson*, 384.

It also was held that the instructions above quoted did not preclude the jury from considering the propriety of the attorney's appearance in the case or any inference of collusion therefrom. *Ibid.*

Agreement for Compensation.

The provisions of R. L. c. 74, § 6, prevent the maintenance of an action of contract by an attorney at law against the executor of a will to enforce an oral agreement by the defendant's testator to bequeath to the plaintiff a certain sum of money in payment for services at that time already rendered and to be rendered to the testator by the plaintiff as an attorney at law. *Runyan* v. *Van Iderstine*, 428.

Amount of Compensation.

Where upon a petition to the Superior Court, alleging that the debts of a certain corporation carrying on an established manufacturing business were not being paid although its assets were sufficient for that purpose and containing no allegation of insolvency, that court appointed a receiver, and afterwards in bankruptcy proceedings a trustee of the corporation was appointed, who appealed from a decree of the Superior Court allowing the receiver's account, it was held, under the circumstances, that the Superior Court, which rightly appointed the receiver, had jurisdiction of all questions relating to his accounting and final discharge, including the fixing of the amounts of compensation for him and his attorneys. *Shannon* v. *Shepard Manuf. Co. Inc.* 224.

In fixing the amount to be allowed to the receiver for expenses incurred for counsel fees it was held to have been proper to allow the amount of compensation paid to counsel for services rendered for the common benefit of the persons interested in bringing the original bill in equity upon which the receiver was appointed. *Ibid.*

AUTOMOBILE.

See Motor Vehicle.

BAILMENT.

Where one, who has hired a safe deposit box from a national bank and who also has a deposit account in the bank, leaves with the officials of the bank a tin box, without disclosing its contents, which is placed in a bank vault

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where books and records are stored, the bank does not become the bailee of a will of the depositor contained in the tin box. *Sawyer* v. *Old Lowell National Bank*, 342.

BANK.

Where a bank has had no actual or constructive notice of fraud or misdoing on the part of a treasurer, who is one of its depositors, if the bank acting in good faith merely credits deposits of checks, which it knows to have been drawn by the treasurer upon the funds of the principal, to the personal account of the treasurer, this does not make it liable to the principal if the treasurer afterwards misappropriates the deposit. *Kendall* v. *Fidelity Trust Co.* 238.

In a suit in equity by the trustees of a land trust against a trust company, seeking to impress with a trust funds deposited with the defendant by the plaintiffs' assistant treasurer, a dishonest agent, it was held under the circumstances that, as the defendant had no interest in the deposits and never had received any part of them for the payment of any debt to it, the defendant could not be charged with constructive notice of the fraudulent conduct of the depositor, and accordingly that there was no evidence that the defendant knew that the depositor intended to misappropriate the funds, and that the plaintiffs were entitled to no relief against it. *Ibid.*

Whether under the national bank act and before the passage of the federal reserve bank act, U. S. St. 1913, c. 6, § 11 k, a national bank had authority to accept a will for safe keeping and would be legally liable for a failure to deliver according to directions a will thus accepted in custody, here was referred to as a question which it was unnecessary to consider. *Sawyer* v. *Old Lowell National Bank*, 342.

Where one, who has hired a safe deposit box from a national bank and who also has a deposit account in the bank, leaves with the officials of the bank a tin box, without disclosing its contents, which is placed in a bank vault where books and records are stored, the bank does not become the bailee of a will of the depositor contained in the tin box. *Ibid.*

BANKRUPTCY.

Where at the time of the filing of a petition in bankruptcy the property of the bankrupt was in the hands of a receiver appointed by the Superior Court, that court has jurisdiction to settle the accounts of its receiver relating to his charge of the property up to the time of the adjudication in bankruptcy some months after the filing of the petition. *Shannon* v. *Shepard Manuf. Co. Inc.* 224.

Where, upon a petition to the Superior Court, alleging that the debts of a certain corporation carrying on an established manufacturing business were not being paid although its assets were sufficient for that purpose and containing no allegation of insolvency, that court appointed a receiver, and afterwards in bankruptcy proceedings a trustee of the corporation was appointed, who appealed from a decree of the Superior Court allowing the receiver's account, it was held, under the circumstances, that the Superior Court, which rightly appointed the receiver, had jurisdiction of all questions relating to his accounting and final discharge, including the fixing of the amounts of compensation for him and his attorneys. *Ibid.*

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BILL OF LADING.

Where under a "straight" bill of lading in the form established by the interstate commerce commission retained by the shipper, a consignee, who is not a party to the bill of lading and does not know its terms, notifies the carrier upon the arrival of the goods that he is not their owner, asks the carrier for the amount of the charges and pays an amount named by the carrier less than the rates established by the tariffs filed and published in compliance with the interstate commerce act and receives the goods, he is not bound by the terms of the contract to which he was not a party and of which he had no notice. *New York Central & Hudson River Railroad* v. *York & Whitney Co.* 206.

In the case in which the point above stated was decided, it was said that it was not necessary to consider what would have been the rights and obligations of the parties if the bill of lading had contained the express stipulation that the consignee alone should pay the freight as a condition precedent to delivery to him. *Ibid.*

Where, however, the consignee before the shipment had been informed at his own request by the freight traffic manager of the carrier of the correct rates with specific references to the published tariffs, a finding was warranted that he knew and expected to pay the legal tariff rates and accepted the goods understanding that the carrier required the payment of the legal charges, and accordingly that upon those shipments he was liable to pay to the carrier the balance above the undercharges. *Ibid.*

Upon further evidence in the same action it was held that under the circumstances shown the plaintiff had the right to treat the defendant as the owner of the carloads and that the jury were warranted in drawing the inference and consequently finding that the defendant impliedly agreed to pay the established interstate charges. Following New York, New Haven, & Hartford Railroad *v.* York & Whitney Co. 215 Mass. 36. *Ibid.*

BILLS AND NOTES.

Negotiable Bond.

A stockbroker, who in good faith and without any knowledge or notice of an infirmity in the title of his customer, sells for such customer a bond of the United States of America payable to bearer, deducts a customary commission therefor and the amount of a stamp which necessarily was affixed and pays the balance of the sale price to his customer, is not liable in an action of tort for conversion to the owner of the bond, from whom it has been stolen and given to the stockbroker's customer to be sold. *Pratt* v. *Higginson*, 256.

The same rule applies to a sale by the stockbroker under the same circumstances of a bond of the American Telephone and Telegraph Company, payable to a bank as trustee or to bearer and convertible at maturity at the owner's option into capital stock of the company, such a bond under R. L. c. 73, § 22, cl. 4, being a negotiable instrument. *Ibid.*

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BOARD OF HEALTH.

State.

Under R. L. c. 75, § 113, as amended by St. 1907, c. 467, § 1, a rule of the State board of health, that "No person shall . . ., unless permitted by a written permit of the board of water commissioners of the city of Haverhill, fish in . . . Crystal Lake . . ., so called, in the city of Haverhill . . ., said lakes . . . being used by said city as sources of water supply," is valid and enforceable. *Commonwealth* v. *Hyde*, 6.

BOND.

To dissolve Attachment or Injunction or Lien.

Where the owner of certain land executed and delivered to a petitioner for the establishment of a mechanic's lien upon the land a bond to dissolve the lien with sureties properly approved, and the petitioner thereupon told one who proposed to purchase the land that the lien was discharged and waived by the giving of the bond but the bond was not recorded within ten days as required by R. L. c. 197, § 28, as amended by Sts. 1906, c. 223; 1909, c. 237, it was held that under the circumstances the petitioner had not thereby waived his lien, nor was he estopped, by reason of his representation based on a false idea as to the law, from pursuing his petition to judgment and sale. *Goldstein* v. *Tucker*, 259.

An attorney at law, retained to prosecute a petition for the enforcement of a mechanic's lien, has no authority, by reason of his general retainer, to bind his client by statements to a stranger as to the effect of an unrecorded bond to dissolve the lien. *Ibid.*

A statement of an attorney at law for a petitioner to enforce a mechanic's lien to a stranger, to the effect that the execution and delivery of a bond to dissolve the lien, which bond is unrecorded, dissolved the lien, is merely an expression of an opinion on a question of law, and, even if authorized by his client, will not operate to estop the client from prosecuting his lien. *Ibid.*

In the absence of fraud or collusion, a judgment entered against two defendants in the lawful exercise of the power of the court is conclusive against a surety upon a bond to dissolve an attachment given by one of the defendants. *Salvin* v. *Sidman*, 278.

Accordingly, it is not a valid defence on the part of such surety in an action against him upon such a bond, that the judgment was entered before the time had expired for the filing of an answer by his principal's co-defendant, who had been made a party defendant by an amendment after the giving of the bond. *Ibid.*

An amendment to the writ and declaration in an action against the maker of a promissory note, adding as a party defendant an indorser of the note, does not change the liability upon a bond to dissolve an attachment given by the first defendant before the allowance of the amendment. *Ibid.*

Therefore, the allowance of such an amendment without notice to the surety does not discharge such surety, and, after judgment against both defendants by default, the plaintiff may maintain an action upon the bond against such surety. *Ibid.*

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BROKER.

Upon the evidence at the trial of an action of tort by a real estate broker against a real estate dealer and another real estate broker, charging the defendants with having conspired to procure through fraud the payment to the defendant broker of a commission on the purchase of a house by the defendant real estate dealer that really had been earned by the plaintiff but had been relinquished by him induced by the fraud of the defendants, it was held that a finding of such a joint tort committed by the defendants was warranted. *Henry W. Savage, Inc.* v. *Wheelock*, 111.

STOCKBROKER, see that title.

BUILDING INSPECTOR.

See that subtitle under MUNICIPAL CORPORATIONS.

CARRIER.

Of Goods.

The provisions of the interstate commerce law as to rates are applicable only to those who expressly or by implication are or become parties to the contract of transportation. Whether one is or has become a party to that contract must be determined by the general principles of the common law. By RUGG, C. J. *New York Central & Hudson River Railroad* v. *York & Whitney Co.* 206.

Where under a "straight" bill of lading in the form established by the interstate commerce commission retained by the shipper, a consignee, who is not a party to the bill of lading and does not know its terms, notifies the carrier upon the arrival of the goods that he is not their owner, asks the carrier for the amount of the charges and pays an amount named by the carrier less than the rates established by the tariffs filed and published in compliance with the interstate commerce act and receives the goods, he is not bound by the terms of the contract to which he was not a party and of which he had no notice. *Ibid.*

In the case in which the point above stated was decided, it was said that it was not necessary to consider what would have been the rights and obligations of the parties if the bill of lading had contained the express stipulation that the consignee alone should pay the freight as a condition precedent to delivery to him. *Ibid.*

Where, however, the consignee before the shipment had been informed at his own request by the freight traffic manager of the carrier of the correct rates with specific references to the published tariffs, a finding was warranted that he knew and expected to pay the legal tariff rates and accepted the goods understanding that the carrier required the payment of the legal charges, and accordingly that upon those shipments he was liable to pay to the carrier the balance above the undercharges. *Ibid.*

Upon further evidence in the same action it was held that under the circumstances shown the plaintiff had the right to treat the defendant as the owner of the carloads and that the jury were warranted in drawing the inference and consequently finding that the defendant impliedly agreed to pay the

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Carrier (*continued*).

established interstate charges. Following New York, New Haven, & Hartford Railroad *v.* York & Whitney Co. 215 Mass. 36. *New York Central & Hudson River Railroad* v. *York & Whitney Co.* 206.

Where the owner and consignee of certain fish agreed with a carrier to make, and did make, an arrangement to replenish ice in a refrigerator car, the bill of lading containing no provision on the subject, and the fish were spoiled by reason of the consignee's own failure to provide sufficient ice to keep them in good condition after their arrival in a freight yard of the carrier, the consignee cannot hold the carrier liable for his loss thus sustained. *Emery & Co. Inc.* v. *Boston & Maine Railroad*, 463.

Circumstances under which the fish failed to be iced because a company whom the owner engaged to attend to it did not arrive at the freight yard until after closing hour, so that the fish spoiled, were held not to show negligence of the carrier. *Ibid.*

Of Passengers.

Provisions of St. 1913, c. 429, and of an ordinance of the city of Springfield, delegating to the police commission of that city the licensing and regulating of the transportation of passengers for hire by motor vehicles, requiring the filing of a bond and fixing a license fee, were held to be constitutional and valid. *Commonwealth* v. *Slocum*, 180.

In an action for personal injuries and death caused by alleged negligence in running into the plaintiff's intestate with a street railway car after he had left a car going in the opposite direction, it was pointed out that the intestate had ceased to be a passenger of the defendant when he had alighted from the car. *Mercier* v. *Union Street Railway*, 397.

Actions for personal injuries or death of passengers caused by negligence of street railway and railroad corporations, see appropriate subtitles under NEGLIGENCE.

CHARITY.

The provisions of the workmen's compensation act do not apply to a corporation organized for carrying on a public charity. *Zoulalian* v. *New England Sanatorium & Benevolent Association*, 102.

A corporation, incorporated "for the purpose of founding a hospital or charitable asylum . . . for the care and relief of indigent or other sick or infirm persons . . . and in no manner directly or indirectly for private profit or dividend paying, to any one," is a valid public charity. *Ibid.*

Charitable trust which was attempted to be created by will but was wholly undefined and invalid. *Blunt* v. *Taylor*, 303.

CHILD.

See PARENT AND CHILD.

CITIES AND TOWNS.

See MUNICIPAL CORPORATIONS.

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CLERK OF COURTS.

By the increase, effected by St. 1917, c. 340, § 1, upon its acceptance by the mayor and city council of Boston, in the salaries of the clerks of police, district and municipal courts, with certain exceptions, to three fourths of the salaries received by the justices of their respective courts from three fifths thereof, as previously provided by St. 1904, c. 453, § 1, the salaries of the assistant clerks, which by the same section of St. 1904, c. 453, had been made two thirds of the salaries of the clerks, were increased to two thirds of the increased salaries of the respective clerks. *Simmons* v. *County of Suffolk*, 236.

COMITY.

By reason of the provisions of a certain policy of life insurance issued by a mutual life insurance company incorporated in the State of New York and because the policy must be construed according to the laws of the State of New York, it was held that the courts of this Commonwealth would not take jurisdiction of a suit in equity by a citizen of the Commonwealth against the company to determine the amount which should be paid by the plaintiff as premiums, to restrain the defendant from declaring the policy forfeited and to compel it to accept a certain amount as full payment of premiums instead of a larger amount fixed by a vote of the directors of the corporation. *Richards* v. *Security Mutual Life Ins. Co.* 320.

COMPROMISE OF CONTROVERSY CONCERNING WILL.

A compromise agreement under R. L. c. 148, §§ 15–18, settling a controversy concerning a will, which is signed by all parties in interest, including a guardian *ad litem* representing all future contingent interests of persons unascertained and not in being who might become interested, it was held, might be found by the Probate Court under St. 1903, c. 222, to be just and reasonable in its effect upon any future contingent interests that might arise under such will within the meaning of R. L. c. 148, § 17, although it cut off all possible benefit which could come to the heirs at law of a son of the testator under the terms of the will. *Copeland* v. *Wheelwright*, 131.

CONFLICT OF LAWS.

By reason of the provisions of a certain policy of life insurance issued by a mutual life insurance company incorporated in the State of New York and because the policy must be construed according to the laws of the State of New York, it was held that the courts of this Commonwealth would not take jurisdiction of a suit in equity by a citizen of this Commonwealth against the company to determine the amount which should be paid by the plaintiff as premiums, to restrain the defendant from declaring the policy forfeited and to compel it to accept a certain amount as full payment of premiums instead of a larger amount fixed by a vote of the directors of the corporation. *Richards* v. *Security Mutual Life Ins. Co.* 320.

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CONSPIRACY.

Upon the evidence at the trial of an action of tort by a real estate broker against a real estate dealer and another real estate broker, charging the defendants with having conspired to procure through fraud the payment to the defendant broker of a commission on the purchase of a house by the defendant real estate dealer that really had been earned by the plaintiff but had been relinquished by him induced by the fraud of the defendants, it was held that a finding of such a joint tort committed by the defendants was warranted. *Henry W. Savage, Inc.* v. *Wheelock*, 111.

A general allegation in a declaration in an action of tort against a number of defendants, that "all of the defendants herein named knowingly and intentionally participated in said unlawful scheme and conspiracy," is merely matter of characterization and does not state a cause of action. *Holden* v. *J. Stevens Arms Co.* 266.

Declaration in an action of tort against three corporations and ten individual defendants, which alleged that the plaintiff had earned a commission from one of the defendant corporations by procuring for it a contract for a sale of rifles to the purchasing agent of a foreign government and that concerted conduct of the defendant's corporation had deprived him of the commission, was held to set forth no cause of action in tort against the defendants. *Ibid.*

CONSTITUTIONAL LAW.

Police Power.

St. 1913, c. 429, in substance empowering the mayor and aldermen and the city council of Springfield to delegate to commissions, boards or heads of departments such powers as to the granting and issuing of licenses or permits as the mayor and aldermen or the city council are authorized to grant and issue by the statutes of the Commonwealth, is constitutional. *Commonwealth* v. *Slocum*, 180.

It is a proper exercise of the power so granted for the city council of Springfield by an ordinance approved by the mayor to delegate to the police commission of that city the power vested in the city by St. 1916, c. 293, upon its acceptance of that statute by the council, of licensing and regulating the transportation of passengers for hire by motor vehicles. *Ibid.*

Fair Trial.

St. 1914, c. 553, does not contravene any provision of the Constitution of the Commonwealth or of the Fourteenth Amendment to the Federal Constitution. *Duggan* v. *Bay State Street Railway*, 370.

Trial by Jury.

R. L. c. 167, § 110, amended by St. 1909, c. 190, does not violate the right to trial by jury secured by the Constitution. *Shea* v. *Peters*, 197.

Taxation.

The imposition by St. 1916, c. 269, called the income tax law, of a tax upon income received by a resident of this Commonwealth from intangible

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property held for his benefit by a trustee resident in another State and not taxable in that State is valid and does not violate any guaranty of the Fourteenth Amendment to the Constitution of the United States. *Maguire* v. *Tax Commissioner*, 503.

CONTRACT.

What constitutes.

Where an alleged contract for the sale of goods was made, if at all, wholly by letters, telegrams and cablegrams, in which no ambiguous words or terms were employed, and where the circumstances under which the correspondence took place are not in controversy, the question whether a contract was made is one of law for the court. *Kehlor Flour Mills Co.* v. *Linden*, 119.

In such a case, in order that there should be a contract, the writings taken together must be so plain in their meaning and effect as not to be open to any reasonable misunderstanding. *Ibid.*

Ordinarily the annexing of a condition to the acceptance of an offer is regarded as the rejection of the original offer and the making of a new counter offer, which will become a contract only upon acceptance in accordance with its terms. *Ibid.*

In an action by a manufacturer of flour doing business in the United States and having an agent in Norway against the members of a firm of merchants in Sweden, for the breach of a contract to purchase from the plaintiff forty thousand sacks of flour alleged to have been made by a correspondence by letter, telegraph and cable which took place within a few weeks after the outbreak of the great war, it was held that, by the correspondence, there was shown an offer made by the plaintiff, not accepted by the defendant, then modified by the plaintiff and accepted by the defendant as modified. *Ibid.*

The provisions of the interstate commerce law as to rates are applicable only to those who expressly or by implication are or become parties to the contract of transportation. Whether one is or has become a party to that contract must be determined by the general principles of the common law. By RUGG, C. J. *New York Central & Hudson River Railroad* v. *York & Whitney Co.* 206.

Where under a "straight" bill of lading in the form established by the interstate commerce commission retained by the shipper, a consignee, who is not a party to the bill of lading and does not know its terms, notifies the carrier upon the arrival of the goods that he is not their owner, asks the carrier for the amount of the charges and pays an amount named by the carrier less than the rates established by the tariffs filed and published in compliance with the interstate commerce act and receives the goods, he is not bound by the terms of the contract to which he was not a party and of which he had no notice. *Ibid.*

In the case in which the point above stated was decided, it was said that it was not necessary to consider what would have been the rights and obligations of the parties if the bill of lading had contained the express stipulation that the consignee alone should pay the freight as a condition precedent to delivery to him. *Ibid.*

Where, however, the consignee before the shipment had been informed at his own request by the freight traffic manager of the carrier of the correct

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rates with specific references to the published tariffs, a finding was warranted that he knew and expected to pay the legal tariff rates and accepted the goods understanding that the carrier required the payment of the legal charges, and accordingly that upon those shipments he was liable to pay to the carrier the balance above the undercharges. *New York Central & Hudson River Railroad* v. *York & Whitney Co.* 206.

Upon further evidence in the same action it was held that under the circumstances shown the plaintiff had the right to treat the defendant as the owner of the carloads and that the jury were warranted in drawing the inference and consequently finding that the defendant impliedly agreed to pay the established interstate charges. Following New York, New Haven, & Hartford Railroad *v.* York & Whitney Co. 215 Mass. 36. *Ibid.*

Where, at the trial of an action by an insurance solicitor against an insurance company upon a contract of employment entered into between the plaintiff and general agents of the defendant, it appeared that the company and the general agent both regarded the contract as binding upon the company, that its officers knew of the contract, that it paid the solicitor his commissions thereunder and that the company was the actor in discharging the solicitor and fixing the terms of his dismissal, findings of the judge were held to have been warranted that the company was liable upon the contract. *Elwell* v. *State Mutual Life Assurance Co.* 248.

If an insurance company issues a policy against fire and theft upon a motor car to a person who does not own the car and has no insurable interest in it and afterwards through an agent agrees orally to substitute in the policy the name of the owner of the car in place of the name of the person to whom it was issued, this gives the owner, in case of loss by theft and fire, no right to bring an action on the policy. *O'Neill* v. *Queen Ins. Co. of America*, 269.

A finding of a judge who heard a suit in equity against a corporation for five years' salary as "supervisor" alleged to be due to the plaintiff in accordance with a vote of the directors of the defendant, was interpreted, upon an appeal from a final decree dismissing the bill, to be a finding to the effect that the vote of the directors was passed with an agreement between them and the plaintiff that it should not be binding upon the defendant; and it therefore was held that the suit must be dismissed. *McCormick* v. *Commercial Brewing Co.* 289.

On the evidence at the trial of an action by an administrator of the estate of his mother against his sister for money alleged to have been "received and borrowed" by the defendant from her mother, it was held that a finding for the plaintiff was not warranted and a verdict properly might be ordered for the defendant. *Harrington* v. *Cousins*, 366.

A declaration alleging in substance that a foreign railroad corporation, desiring to extend its line of railroad through this Commonwealth, caused a corporation to be organized and incorporated in this Commonwealth for that purpose, which was owned, officered and controlled by the foreign corporation, that the foreign corporation "through the instrumentality of its *alter ego*," the Massachusetts corporation, entered into a contract with the plaintiff for the construction of the proposed line in this Commonwealth, which was broken, was held on demurrer to state no cause of action. *Marsch* v. *Southern New England Railroad*, 483.

It further was held that the contract in question was made only with the

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Massachusetts corporation, which was separate and distinct from the defendant, that the motive of the defendant in acquiring control of the Massachusetts corporation was immaterial, and that the Massachusetts corporation could not be treated as the defendant's "*alter ego*" or agent when openly contracting for itself in its own corporate name. *Marsch* v. *Southern New England Railroad*, 483.

Action for breach of a contract made by correspondence, whereby the plaintiff agreed to sell and deliver and the defendant agreed to purchase and pay for certain marble to be used for the interior finish of a post office building. *Puffer Manuf. Co.* v. *Yeager*, 557.

Validity.

Contract of conditional sale to an infant which was held to have been voidable by him. *Knudson* v. *General Motorcycle Sales Co. Inc.* 54.

At the trial of an action by an employee against his employer, a corporation, for personal injuries, where the plaintiff admitted that he received money from the defendant and signed an instrument purporting to release and discharge it from all claims relating thereto, and that he understood the contents of the instrument, certain evidence of conversations of the employee with a physician employed by the employer, who had given him first aid treatment, fell short of showing that the release was invalid. *Walsh* v. *Fore River Shipbuilding Co.* 89.

A compromise agreement under R. L. c. 148, §§ 15–18, settling a controversy concerning a will, which is signed by all parties in interest, including a guardian *ad litem* representing all future contingent interests of persons unascertained and not in being who might become interested, it was held, might be found by the Probate Court under St. 1913, c. 222, to be just and reasonable in its effect upon any future contingent interests that might arise under such will within the meaning of R. L. c. 148, § 17, although it cut off all possible benefit which could come to the heirs at law of a son of the testator under the terms of the will. *Copeland* v. *Wheelwright*, 131.

A person seasonably may rescind a contract which he has been induced to enter into in reliance upon false, though innocent, misrepresentations respecting a cognizable material fact made as of his own knowledge by the other party to the contract. *Bates* v. *Cashman*, 167.

It is fraud for one in negotiations leading to the making of a contract to state a fact as true of his own knowledge when he has no such knowledge. *Ibid.*

A suit for the specific performance of a contract to purchase capital stock and bonds of a corporation cannot be maintained where it appears that the defendant was induced to make the contract by false, though innocent, misrepresentations respecting a cognizable material fact made as of his own knowledge by the plaintiff. *Ibid.*

Provisions of a contract in writing for the construction of a railroad from Palmer to a point in Blackstone adjoining the State line of Rhode Island, establishing certain conditions precedent to a right by the contractor to demand payment, were held to be valid. *Marsch* v. *Southern New England Railroad*, 483.

It was held that there was nothing contrary to public policy in certain provisions in a building contract giving the owner a right to suspend the work

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at will without expense or liability for damage, when made by the parties voluntarily and advisedly. *Marsch* v. *Southern New England Railroad*, 483.

In the same case it was held that certain provisions of the contract in regard to the conclusiveness of the engineer's certificates and to the qualifications of the engineer as arbitrator were not void because the engineer was an officer or agent of one of the parties to the contract and from the nature of his employment might be biased in his judgment. *Ibid.*

Certain provisions in the same contract providing that the certificate to be given by the engineer should be final and conclusive as to the construction of the contract, or as to any question of law or fact, were held not to be illegal as an attempt to oust the courts of their jurisdiction respecting the subject matter of the contract, because by the terms of the contract the contractor could have no right of action to which the jurisdiction of the court could attach until he should present a certificate of the engineer unimpeachable in the absence of fraud. *Ibid.*

Consideration.

An insurance solicitor, who had made a contract in writing with a firm composed of two partners, who were the general agents of a life insurance company, regarding compensation, which provided that the contract should be terminated as between the parties only in certain specific instances, upon dissolution of the partnership agreed orally with the remaining partner, who then made a new contract of general agency with the company, that the provisions of the contract formerly made with him by the firm should continue in force, and it was held that the new oral contract was supported by a good consideration. *Elwell* v. *State Mutual Life Assurance Co.* 248.

Construction.

In a contract in writing for the employment of a salesman working on a commission, a promise by the salesman that he will "not during the life of this contract handle or represent or be interested in the sale of any other goods of like kinds as those handled by the" employer, does not entitle the employer to the entire time of the salesman in the sale of its goods nor prevent the salesman from selling the products of others so long as he does not handle or represent or become interested in the sale of goods of like kinds to those handled by the employer. *Mills* v. *U. S. Slicing Machine Co.* 95.

A contract by the proprietor of a stone crusher for the crushing of stone, in which he agreed to furnish a stone crushing plant and the other party to the contract agreed "to furnish a suitable location for the crusher," was held to have been broken by the other party to the contract when performance was prevented by an injunction, issued before the beginning of the crushing operations in a suit brought by persons living in the vicinity of the location, prohibiting the operation of the crusher as a nuisance. *Wellington* v. *Crowley*, 107.

In interpreting a correspondence between a manufacturing corporation in this country through its agent in Norway and a firm of merchants in Sweden, which took place a few weeks after the outbreak of the great war, it was said that in general the court will take judicial notice of the disturbance of

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commercial relations between neutral countries dependent upon navigation in the zone affected by that war. *Kehlor Flour Mills Co.* v. *Linden*, 119.

An insurance solicitor, who had made a contract in writing with a firm composed of two partners, who were the general agents of a life insurance company, regarding compensation, which provided that the contract should be terminated as between the parties only in certain specific instances, upon dissolution of the partnership agreed orally with the remaining partner, who then made a new contract of general agency with the company, that the provisions of the contract formerly made with him by the firm should continue in force, and it was held that the new oral contract was supported by a good consideration and was not terminable at the will of the general agent, but could be determined only in accordance with the provisions of the former contract in writing which it adopted. *Elwell* v. *State Mutual Life Assurance Co.* 248.

A provision of such contract, which provided for its termination if the solicitor left the agency of the company to engage in other business or became connected with another life insurance company or severed his connections with the agency, was held to mean that such termination should occur upon a volunatry retirement by the solicitor, and not to mean that it would occur upon his discharge for a cause not included in the contract's provisions or upon his enforced resignation. *Ibid.*

In a contract for the sale of cod liver oil the phrases "cold pressed provincial medicine oil" and "pure medicinal cod liver oil" were held to be descriptive of the kind and quality of oil required so as to constitute words of warranty. *Leonard* v. *Carleton & Hovey Co.* 262.

In an action for the price of cod liver oil sold and delivered, where the defendant contended that he was not bound to take and pay for the oil because it was not of the kind and quality required by the contract, it was held that there was evidence warranting a finding that "cold pressed provincial medicine oil" and "pure medicinal cod liver oil" meant, as used in the trade, merchantable provincial or domestic oil made from the fresh livers of the cod and kindred fish, such as pollock, hake and haddock, excluding oil obtained from the livers of dog fish, and that the oil furnished by the plaintiff was of this kind and quality. *Ibid.*

Upon the evidence at the trial of an action for personal injuries from being struck on the head by a piece of ice falling from a building of the defendant as to the circumstances under which the plaintiff accepted $5 and signed a release, it was held that the jury were warranted in finding that the defendant's agent made representations that the release referred only to damage to the plaintiff's muff and that they were binding upon the defendant, and that the release therefore did not bar the action. *Connors* v. *Richards*, 436.

Letter of an architect, containing an acceptance of a building upon condition that the contractor was to remedy certain defects of workmanship or of materials, was held not of itself to be a final certificate under the provisions of a building contract, which could be treated as conclusive evidence of performance, although the contractor promptly performed the conditions named in the architect's letter. *Hennebique Construction Co.* v. *Boston Cold Storage & Terminal Co.* 456.

It was held that the certificate required by the provisions in the contract above referred to must be complete and must contain a statement in writing

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authenticated by the signature of the architect that the final payment, naming the amount, was payable to the contractor under the terms of the contract. *Hennebique Construction Co.* v. *Boston Cold Storage & Terminal Co.* 456.

Evidence at the trial of an action for breach of a contract, made by correspondence, whereby the plaintiff agreed to sell and deliver and the defendant agreed to purchase and pay for certain marble to be used for the interior finish of a post office building, which was offered to show a general custom that such contracts relating to the construction of government buildings always were subject to a condition that samples should be approved by a supervising architect employed by the national government, was held properly to have been excluded, there being no offer to show that the plaintiff had knowledge of the custom and the evidence not tending to show a custom of such general and universal application that the plaintiff must be presumed to have had knowledge of it. *Puffer Manuf. Co.* v. *Yeager*, 557.

A finding for the plaintiff at the trial of the action above described was held to mean that the judge found that the plaintiff had no notice of such a custom. *Ibid.*

Performance and Breach.

In an action on a contract in writing, by which the defendant agreed to construct a building for the plaintiff, for damages caused by the defendant's failure to make the building waterproof, whereby the plaintiff's goods stored there became damaged, where there was evidence warranting a finding that a final certificate, called for by the contract, was never given or intended to be given by the architect as arbitrator under the contract, and that the contract had not been performed by the defendant, requests for rulings that "The original contract was conclusively settled by the making and acceptance of the final certificate and payment," and "that the plaintiff could not recover on the principal contract because of the issuance of the architect's final certificate and payment thereunder," properly were refused. *Dondis* v. *Borden*, 73.

A contract by the proprietor of a stone crusher for the crushing of stone, in which he agreed to furnish a stone crushing plant and the other party to the contract agreed "to furnish a suitable location for the crusher," was held to have been broken by the other party to the contract when performance was prevented by an injunction, issued before the beginning of the crushing operations in a suit brought by persons living in the vicinity of the location, prohibiting the operation of the crusher as a nuisance. *Wellington* v. *Crowley*, 107.

An unwarranted mistake by one of the parties to a contract in writing as to the meaning of the contract is no excuse for a breach of the contract by him due to such unreasonable misunderstanding. *Kehlor Flour Mills Co.* v. *Linden*, 119.

Where one of the parties to an executory contract clearly breaks his agreement, rendering performance by the other party impracticable, the right of such other party to indemnity by an action for damages at once accrues, and he is not obliged to wait before bringing his action until the arrival of the time when, if there had been no breach, both parties would have performed their obligations fully. *Ibid.*

Where, at the trial of an action by an insurance solicitor against an insurance

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company upon a contract of employment entered into between the plaintiff and general agents of the defendant, it appeared that the company and the general agent both regarded the contract as binding upon the company, that its officers knew of the contract, that it paid the solicitor his commissions thereunder and that the company was the actor in discharging the solicitor and fixing the terms of his dismissal, findings of the judge were held to have been warranted that the company was liable upon the contract. *Elwell* v. *State Mutual Life Assurance Co.* 248.

The mere fact, that an insurance solicitor advocated and sought legislation providing for a different form of endowment policy than that issued by a company by whose general agents he was employed, does not show disloyalty on his part warranting his discharge, where it appears that he honestly believed that the form of policy which he advocated, if adopted, would enure to the advantage not only of the insured but also of the company, and that his activities in this regard were known to the company. *Ibid.*

In an action upon the same contract against the general agent it was held that the general agent likewise was liable personally to the solicitor, although the solicitor could have but one satisfaction in damages. *Ibid.*

Upon the evidence at the hearing of an action for breach of a contract to manufacture and deliver to the plaintiff one hundred and fifty dozen of Shaker knit sweaters of seven specified styles for about $9,000 in all, in which the defendant relied on the defence that he was warranted in cancelling the plaintiff's order by reason of a breach of the contract on the part of the plaintiff, it was held that a finding that a delay of the plaintiff in making a payment, relatively small, went to the root of the contract and justified the defendant in cancelling the rest of the order, was warranted. *Dudley* v. *Wye*, 350.

Letter of an architect, containing an acceptance of a building upon condition that the contractor was to remedy certain defects of workmanship or of materials, was held not of itself to be a final certificate under the provisions of a building contract, which could be treated as conclusive evidence of performance, although the contractor promptly performed the conditions named in the architect's letter. *Hennebique Construction Co.* v. *Boston Cold Storage & Terminal Co.* 456.

It was held that the certificate required by the provisions in the contract above referred to must be complete and must contain a statement in writing authenticated by the signature of the architect that the final payment, naming the amount, was payable to the contractor under the terms of the contract. *Ibid.*

Whether, under all the circumstances, the letter above described operated as a waiver of the right of the owner to insist upon the architect's final certificate, and, if it did so operate, whether the owner thereby was precluded from claiming in recoupment damages for defective workmanship or materials, were questions not raised by the record. *Ibid.*

It was held that, in order to state a cause of action of the contractor for breach of a contract for the construction of a railroad from Palmer to a point in Blackstone, the declaration must allege the performance of the condition precedent by the approval and certificate of the defendant's engineer or that the performance of this condition was excused. *Marsch* v. *Southern New England Railroad*, 483.

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Allegations in the declaration in the action above described as excuse for not procuring the approval and certificate of the defendant's engineer, were held to state no ground for questioning the decision of the engineer, who was by the contract to be disqualified as *quasi* arbitrator on no ground less than "actual fraud." *Marsch* v. *Southern New England Railroad*, 483.

Allegations in the same declaration that the engineer "was under the absolute control and direction of the defendant, and said defendant could at any time by the terms of said contract dismiss said engineer and appoint any other person to act in his stead," were held not sufficient allegations of bias, fraud or prejudice to show collusion and fraud and were not enough to require judicial inquiry. *Ibid.*

In the same case it was held that an allegation in the declaration that "certain portions of the work, which by the terms of said contract the plaintiff was entitled to perform . . . were taken from the plaintiff . . . and given to other parties, whereby the plaintiff was deprived of the profit which would have accrued" to him, stated no cause of action, because under the contract the defendant had a right to do this. *Ibid.*

In the same case it was held that allegations contained in the declaration seeking damages on the ground, that the defendant repeatedly interrupted and suspended the progress of the work for long periods of time and prevented the plaintiff from completing the work and the construction of the roadway and that such interruptions and suspensions were not ordered in good faith, stated no cause of action, because the defendant was acting within rights given by the contract and its motive in doing what it had a right to do under the contract was immaterial. *Ibid.*

In the same case it was held that the plaintiff stated no cause of action in regard to extra work alleged to have been required of him by the defendant, because the allegations of the declaration did not bring the alleged extra work within the requirements of the contract. *Ibid.*

Action for breach of a contract made by correspondence, whereby the plaintiff agreed to sell and deliver and the defendant agreed to purchase and pay for certain marble to be used for the interior finish of a post office building. *Puffer Manuf. Co.* v. *Yeager*, 557.

Where there was conflicting evidence, at the trial of the action above described, as to whether a written statement of a condition that samples should be approved by the supervising architect was included in a set of plans sent to the plaintiff by the defendant and the judge found for the plaintiff, it was held that this finding must mean that the judge found that no such written statement was furnished to the plaintiff. *Ibid.*

Damages to be assessed for breaches of contracts, see appropriate subtitle under DAMAGES.

Rescission.

A person seasonably may rescind a contract which he has been induced to enter into in reliance upon false, though innocent, misrepresentations respecting a cognizable material fact made as of his own knowledge by the other party to the contract. *Bates* v. *Cashman*, 167.

Termination.

An insurance solicitor, who had made a contract in writing with a firm composed of two partners, who were the general agents of a life insurance com-

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pany, regarding compensation, which provided that the contract should be terminated as between the parties only in certain specific instances, upon dissolution of the partnership agreed orally with the remaining partner, who then made a new contract of general agency with the company, that the provisions of the contract formerly made with him by the firm should continue in force, and it was held that the new oral contract was supported by a good consideration and was not terminable at the will of the general agent, but could be terminated only in accordance with the provisions of the former contract in writing which it adopted. *Elwell* v. *State Mutual Life Assurance Co.* 248.

A provision of such contract, which provided for the termination if the solicitor left the agency of the company to engage in other business or became connected with another life insurance company or severed his connections with the agency, was held to mean that such termination should occur upon a voluntary retirement by the solicitor, and not to mean that it would occur upon his discharge for a cause not included in the contract's provisions or upon his enforced resignation. *Ibid.*

Where such a contract, made by the company's general agent, was a complete contract for services to be rendered by the solicitor, the compensation for which was to be paid by the company, the company was held to have no power to terminate it in the absence of a provision in the contract for such termination by the company. *Ibid.*

Incorporation of Custom.

Evidence at the trial of an action for breach of a contract, made by correspondence, whereby the plaintiff agreed to sell and deliver and the defendant agreed to purchase and pay for certain marble to be used for the interior finish of a post office building, which was offered to show a general custom that such contracts relating to the construction of government buildings always were subject to a condition that samples should be approved by a supervising architect employed by the national government, was held properly to have been excluded, there being no offer to show that the plaintiff had knowledge of the custom and the evidence not tending to show a custom of such general and universal application that the plaintiff must be presumed to have had knowledge of it. *Puffer Manuf. Co.* v. *Yeager*, 557.

Where there was conflicting evidence, at the trial of the action above described, as to whether a written statement of a condition that samples should be approved by the supervising architect was included in a set of plans sent to the plaintiff by the defendant and the judge found for the plaintiff, it was held that this finding must mean that the judge found that no such written statement was furnished to the plaintiff and that the plaintiff had no notice of such a custom; and that, upon such findings, a further finding for the plaintiff was warranted. *Ibid.*

In Writing.

Upon the evidence at the trial of an action for personal injuries from being struck on the head by a piece of ice falling from a building of the defendant as to the circumstances under which the plaintiff accepted $5 and signed a release, it was held that the jury were warranted in finding that the

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defendant's agent made representations that the release referred only to damage to the plaintiff's muff and that they were binding upon the defendant, and that the release therefore did not bar the action. *Connors* v. *Richards*, 436.

Implied.

An action of contract for money had and received cannot be maintained against two defendants jointly to recover money received to the plaintiff's use by only one of them. *Henry W. Savage, Inc.* v. *Wheelock*, 111.

Building Contract.

In an action on a contract in writing, by which the defendant agreed to construct a building for the plaintiff, for damages caused by the defendant's failure to make the building waterproof, whereby the plaintiff's goods stored there became damaged, where there was evidence warranting a finding that a final certificate, called for by the contract, never was given nor intended to be given by the architect as arbitrator under the contract, and that the contract had not been performed by the defendant, requests for rulings that "The original contract was conclusively settled by the making and acceptance of the final certificate and payment," and "that the plaintiff could not recover on the principal contract because of the issuance of the architect's final certificate and payment thereunder," properly were refused. *Dondis* v. *Borden*, 73.

In the case above described it also was held that the judge properly refused to rule that the plaintiff could not recover under a certain guaranty clause in the contract, because the request for the ruling was inappropriate, the plaintiff having made no claim under that clause. *Ibid.*

In the case above described, where an auditor found "that the defendant knew that said basement was to be used for the storage of dry goods and merchandise," and "that the plaintiff's goods and merchandise in the basement became damp and mouldy due to the absence of waterproofing," it was held proper to refuse to rule, at the request of the defendant, that, "Even though the defendant knew that the store was to be used for the storage of goods, the plaintiff [defendant] would not be liable for damage thereto because the defendant's act in omitting the waterproofing would not be the proximate cause of such damage." *Ibid.*

Under R. L. c. 104, §§ 22, 55, relating to the filing of a copy of the plans for the erection of a school house with the inspector of factories and public buildings for the district in which it is to be erected, a contractor engaged in the erection of a school house is not required to file a copy of the plans, and his failure to do so does not deprive him of any rights under the contract. *Ordway* v. *Newburyport*, 306.

The issuing of a certificate of the inspector of factories and public buildings indorsed with the approval of the chief of the district police, which is mentioned in § 22, is not a condition precedent to recovery from the city by one who has supplied materials and labor for heating and ventilating the school house in accordance with his contract to do so. *Ibid.*

In such an action on a contract for heating and ventilating the school house building the fact, that the plaintiff knew that the inspector had disapproved the plans submitted for heating the building, does not deprive him of his

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right to recover, if he has performed fully the work required by the plans and the specifications in his contract and if the disapproval of the inspector related wholly to a defect in the work done by the general contractor for the building of the school house. *Ordway* v. *Newburyport*, 306.

Letter of an architect, containing an acceptance of a building upon condition that the contractor was to remedy certain defects of workmanship or of materials, was held not of itself to be a final certificate under the provisions of a building contract, which could be treated as conclusive evidence of performance, although the contractor promptly performed the conditions named in the architect's letter. *Hennebique Construction Co.* v. *Boston Cold Storage & Terminal Co.* 456.

It was held that the certificate required by the provisions in the contract above referred to must be complete and must contain a statement in writing authenticated by the signature of the architect that the final payment, naming the amount, was payable to the contractor under the terms of the contract. *Ibid.*

Whether, under all the circumstances, the letter above described operated as a waiver of the right of the owner to insist upon the architect's final certificate, and, if it did so operate, whether the owner thereby was precluded from claiming in recoupment damages for defective workmanship or materials, were questions not raised by the record. *Ibid.*

Provisions of a contract in writing for the construction of a railroad from Palmer to a point in Blackstone adjoining the State line of Rhode Island, establishing certain conditions precedent to a right by the contractor to demand payment, were held to be valid. *Marsch* v. *Southern New England Railroad*, 483.

It also was held that, in order to state a cause of action of the contractor for a breach of this contract, the declaration must allege the performance of the condition precedent by the approval and certificate of the defendant's engineer or that the performance of this condition precedent was excused. *Ibid.*

Allegations in the declaration in the action above described as excuse for not procuring the approval and certificate of the defendant's engineer, were held to state no ground for questioning the decision of the engineer, who by the contract was to be disqualified as *quasi* arbitrator on no ground less than "actual fraud." *Ibid.*

In the same case it was held that certain provisions of the contract in regard to the conclusiveness of the engineer's certificates and to the qualifications of the engineer as arbitrator were not void because the engineer was an officer or agent of one of the parties to the contract and from the nature of his employment might be biased in his judgment. *Ibid.*

Certain provisions in the same contract providing that the certificate to be given by the engineer shall be final and conclusive as to the construction of the contract, or as to any question of law or fact, were held not to be illegal as an attempt to oust the courts of their jurisdiction respecting the subject matter of the contract, because by the terms of the contract the contractor could have no right of action to which the jurisdiction of the court could attach until he should present a certificate of the engineer unimpeachable in the absence of fraud. *Ibid.*

In the same case it was held that an allegation in the declaration that "certain portions of the work, which by the terms of said contract the plaintiff was

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entitled to perform . . . were taken from the plaintiff . . . and given to other parties, whereby the plaintiff was deprived of the profit which would have accrued" to him, stated no cause of action, because under the contract the defendant had a right to do this. *Marsch* v. *Southern New England Railroad*, 438.

Allegations in the same declaration, that the engineer "was under the absolute control and direction of the defendant, and said defendant could at any time by the terms of said contract dismiss said engineer and appoint any other person to act in his stead" were held not sufficient allegations of bias, fraud or prejudice to show collusion and fraud and were not enough to require judicial inquiry. *Ibid.*

In the same case it was held that allegations contained in the declaration seeking damages on the ground, that the defendant repeatedly interrupted and suspended the progress of the work for long periods of time and prevented the plaintiff from completing the work and the construction of the roadway and that such interruptions and suspensions were not ordered in good faith, stated no cause of action, because the defendant was acting within rights given by the contract and its motive in doing what it had a right to do under the contract was immaterial. *Ibid.*

In the same case it was held that there was nothing contrary to public policy in an agreement like that contained in the provision of the contract last described above, when made by the parties voluntarily and advisedly, as it was in the present case. *Ibid.*

In the same case it was held that the plaintiff stated no cause of action in regard to extra work alleged to have been required of him by the defendant, because the allegations of the declaration did not bring the alleged extra work within the requirements of the contract. *Ibid.*

For Erection of School House.

Under R. L. c. 104, §§ 22, 55, relating to the filing of a copy of the plans for the erection of a school house with the inspector of factories and public buildings for the district in which it is to be erected, a contractor engaged in the erection of a school house is not required to file a copy of the plans, and his failure to do so does not deprive him of any rights under the contract. *Ordway* v. *Newburyport*, 306.

The issuing of a certificate of the inspector of factories and public buildings indorsed with the approval of the chief of the district police, which is mentioned in § 22, is not a condition precedent to recovery from the city by one who has supplied materials and labor for heating and ventilating the school house in accordance with his contract to do so. *Ibid.*

In such an action on a contract for heating and ventilating the school house building the fact, that the plaintiff knew that the inspector had disapproved the plans submitted for heating the building, does not deprive him of his right to recover, if he has performed fully the work required by the plans and the specifications in his contract and if the disapproval of the inspector related wholly to a defect in the work done by the general contractor for the building of the school house. *Ibid.*

Of Employment.

In a contract in writing for the employment of a salesman working on a commission, a promise by the salesman that he will "not during the life of this

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contract handle or represent or be interested in the sale of any other goods of like kinds as those handled by the" employer, does not entitle the employer to the entire time of the salesman in the sale of its goods nor prevent the salesman from selling the products of others so long as he does not handle or represent or become interested in the sale of goods of like kinds to those handled by the employer. *Mills* v. *U. S. Slicing Machine Co.* 95.

An insurance solicitor, who had made a contract in writing with a firm composed of two partners, who were the general agents of a life insurance company, regarding compensation, which provided that the contract should be terminated as between the parties only in certain specified instances, upon dissolution of the partnership agreed orally with the remaining partner, who then made a new contract of general agency with the company, that the provisions of the contract formerly made with him by the firm should continue in force, and it was held that the new oral contract was supported by a good consideration and was not terminable at the will of the general agent, but could be terminated only in accordance with the provisions of the former contract in writing which it adopted. *Elwell* v. *State Mutual Assurance Co.* 248.

A provision of such contract, which provided for the termination if the solicitor left the agency of the company to engage in other business or became connected with another life insurance company or severed his connections with the agency, was held to mean that such termination should occur upon a voluntary retirement by the solicitor, and not to mean that it would occur upon his discharge for a cause not included in the contract's provisions or upon his enforced resignation. *Ibid.*

Where such a contract, made by the company's general agent, was a contract for services to be rendered by the solicitor, the compensation for which was to be paid by the company, the company was held to have no power to terminate it in the absence of a provision in the contract for such termination by the company. *Ibid.*

An oral contract between a solicitor of insurance and a life insurance company or its general agent, which is to continue in force during the continuation of the general agency or until it is terminated by reason of one of several specified acts on the part of the solicitor, and which provides for the payment to the solicitor as compensation of a certain percentage of first year's premiums and another percentage of all renewal premiums upon policies procured by him from the company, is not within the provisions of the statute of frauds, R. L. c. 74, § 1, cl. 5. *Ibid.*

If, when an employee gives notice to his employer as to a defect which was in existence and was open and obvious when he entered upon his employment, he insists upon its being made safe and the employer makes a promise to remedy it in such terms as to amount to a new contract of employment whereby the employee agrees to continue in the employment for a new period of service and the employer agrees to remedy the defect, and the defect is not remedied and the employee is injured by reason thereof, St. 1909, c. 363, becomes applicable and the employee will not be held to have assumed the risk of injury from the defect. *Wood* v. *Danas*, 587.

Evidence at the trial of an action by a woman against her employer for such injuries from which it was held that it must be inferred that the plaintiff's

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employment could be terminated at will, and that, upon the evidence, the jury might find that a new contract of service was made, the plaintiff agreeing to continue in the employ for a new term of service and the defendants agreeing to put the stairway in a safe condition. *Wood* v. *Danas*, 587.

To make Legacy.

The provisions of R. L. c. 74, § 6, prevent the maintenance of an action of contract by an attorney at law against the executor of a will to enforce an oral agreement by the defendant's testator to bequeath to the plaintiff a certain sum of money in payment for services at that time already rendered and to be rendered to the testator by the plaintiff as an attorney at law. *Runyan* v. *Van Iderstine*, 428.

Voidable by Infant.

See INFANT.

Wagering Contracts.

See that title.

CONVERSION.

A stockbroker, who in good faith and without any knowledge or notice of an infirmity in the title of his customer, sells for such customer a bond of the United States of America payable to bearer, deducts a customary commission therefor and the amount of a stamp which necessarily was affixed and pays the balance of the sale price to his customer, is not liable in an action of tort for conversion to the owner of the bond, from whom it has been stolen and given to the stockbroker's customer to be sold. *Pratt* v. *Higginson*, 256.

The same rule applies to a sale by the stockbroker under the same circumstances of a bond of the American Telephone and Telegraph Company, payable to a bank as trustee or to bearer and convertible at maturity at the owner's option into capital stock of the company, such a bond under R. L. c. 73, § 22, cl. 4, being a negotiable instrument. *Ibid.*

CORPORATION.

Identity.

A declaration alleging in substance that a foreign railroad corporation, desiring to extend its line of railroad through this Commonwealth, caused a corporation to be organized and incorporated in this Commonwealth for that purpose, which was owned, officered and controlled by the foreign corporation, that the foreign corporation "through the instrumentality of its *alter ego*," the Massachusetts corporation, entered into the contract with the plaintiff for the construction of the proposed line in this Commonwealth, which was broken, was held on demurrer to state no cause of action. *Marsch* v. *Southern New England Railroad*, 483.

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It further was held that the contract in question was made only with the Massachusetts corporation, which was separate and distinct from the defendant, that the motive of the defendant in acquiring control of the Massachusetts corporation was immaterial, and that the Massachusetts corporation could not be treated as the defendant's "*alter ego*" or agent when openly contracting for itself in its own corporate name. *Marsch* v. *Southern New England Railroad*, 483.

In an action against both the Massachusetts corporation and the foreign corporation, it was assigned as a ground of demurrer that there was a misjoinder of parties, and it was held that it was improper to join the Massachusetts corporation as the agent of a declared principal with itself as principal in allegations of a joint undertaking with the defendant foreign corporation for which in the making of the contract with the plaintiff it was alleged to have acted as agent. *Ibid.*

Officers and Agents.

Vote of all the directors, who owned all the stock of a corporation, that any net earnings in excess of the amount required to pay a dividend of eight per cent per annum on the capital stock of this company should be distributed in the proportion of three fifths of such net earnings to the president, one fifth to the vice-president, and one fifth to the assistant treasurer, which afterwards was ratified by unanimous votes at subsequent meetings of the stockholders and the directors, was held to be valid. *Foster* v. *C. G. Howes Co.* 43.

Where the assistant treasurer accepted notes of the corporation of the face value of $2,000 in full satisfaction and discharge of his entire demand against the company, which amounted to $3,403, and an auditor to whom was referred an action upon one of the notes found that "the act of signing and delivery of the notes was fully ratified by the directors and stockholders, and therefore by the company itself, and that the right of the company to avoid the contract thus made, if such right ever existed, has been waived, and the notes in suit are valid outstanding obligations of the defendant," it was held that this finding was warranted. *Ibid.*

In an action of contract against a corporation for breach of a contract in writing whereby the defendant agreed to employ the plaintiff for a year, a contention by the defendant, that one, who purported to act in its behalf in making the contract with the plaintiff and afterwards in discharging the plaintiff, had no authority so to act, became immaterial where it appeared that the defendant by its letters and its conduct ratified such acts of its alleged agent. *Mills* v. *U. S. Slicing Machine Co.* 95.

A finding of a judge who heard a suit in equity against a corporation for five years' salary as "supervisor" alleged to be due to the plaintiff in accordance with a vote of the directors of the defendant, was interpreted, upon an appeal from a final decree dismissing the bill, to be a finding to the effect that the vote of the directors was passed with an agreement between them and the plaintiff that it should not be binding upon the defendant; and it therefore was held that the suit must be dismissed. *McCormick* v. *Commercial Brewing Co.* 289.

The ruling of the judge that the directors had no power to pass the vote in question was held to have been erroneous; but it also was held that, in view of the judge's finding, the error was immaterial. *Ibid.*

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Corporation (*continued*).

The question, whether further findings of the judge as to the secret and fraudulent character of the vote were warranted, also was held in view of the finding above described, to have been immaterial. *McCormick* v. *Commercial Brewing Co.* 289.

Ultra Vires.

If a city makes an excavation between the rails of a street car track and the street railway corporation undertakes to guard the hole and to prevent travellers from falling into it, the assumption of that duty is not an act by the corporation *ultra vires*. *Charles* v. *Boston Elevated Railway*, 536.

Charitable.

The provisions of the workmen's compensation act do not apply to a corporation organized for and carrying on a public charity. *Zoulalian* v. *New England Sanatorium & Benevolent Association*, 102.

A corporation, incorporated "for the purpose of founding a hospital or charitable asylum . . . for the care and relief of indigent or other sick or infirm persons . . . and in no manner directly or indirectly for private profit or dividend paying, to any one," is a valid public charity. *Ibid.*

In an action for personal injuries by an employee against a corporation organized for and engaged in a work which is a public charity, and which is not a subscriber under the workmen's compensation act, where it appears that the plaintiff was injured upon a buzz planer negligently permitted by the defendant to be operated without a guard, if it also appears that the risk of injury to the plaintiff from that cause was an obvious one which could be seen by reasonable observation on his part, he is precluded from recovery either under the employers' liability act or at common law. *Ibid.*

The question, whether the character of the defendant and of its work would have prevented it from being held liable in any event for its negligence or the negligence of its servants or agents, was not considered. *Ibid.*

Municipal Corporations.

See that title.

Value of Stock.

Ruling of a master, to whom a suit in equity for an accounting was referred to ascertain the value of the stock of a certain corporation at a certain date, admitting and considering evidence showing the earnings of that corporation for the three years succeeding the date in question, was said not to have harmed a party who objected to it. *Arnold* v. *Maxwell*, 441.

Equitable Attachment of Shares.

Under St. 1910, c. 531, § 2, a suit cannot be maintained to reach and apply a certificate of shares in a certain corporation in the possession of the prin-

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cipal defendant but standing in the name of another person, whose name is indorsed upon the back of the certificate, if the certificate contains a provision making it subject to a by-law by which shares in the corporation can be transferred only by offering them first to the directors of the corporation, who have the right to buy them at their book value. *Stone, Timlow & Co. Inc.* v. *Stryker*, 67.

COSTS.

See appropriate subtitle under EQUITY PLEADING AND PRACTICE.

COVENANT.

In an action of contract on a covenant of warranty in a deed to the plaintiff from the defendant it appeared that the defendant had acquired title by a deed which recited that the consideration was paid by her, that in the granting clause the word "said" was followed by the name of her husband, while the habendum clause ran to her by name and "his" heirs and assigns, and it was held that the intention of the parties to vest the title in the defendant was clear and that the plaintiff was not entitled to recover on the warranty. *Goodman* v. *Telfer*, 157.

CRYSTAL LAKE.

Under R. L. c. 75, § 113, as amended by St. 1907, c. 467, § 1, a rule of the State board of health, that "No person shall . . ., unless permitted by a written permit of the board of water commissioners of the city of Haverhill, fish in . . . Crystal Lake . . ., so called, in the city of Haverhill . . ., said lakes . . . being used by said city as sources of water supply," is valid and enforceable. *Commonwealth* v. *Hyde*, 6.

CUSTOM.

Mail carrier who, while engaged in the performance of his duties upon a cinder walk between tracks at a railroad station, was struck by a train coming from the west, was held to have been entitled to rely to a certain extent upon a custom, which could have been found to exist and of which he had knowledge, that the train from the west under the circumstances should wait beyond the switch until the train upon the siding had discharged mail, express matter and passengers and until those obliged to cross the main track had had an opportunity to reach a place of safety. *French* v. *Boston & Maine Railroad*, 163.

Evidence at the trial of an action for breach of a contract, made by correspondence, whereby the plaintiff agreed to sell and deliver and the defendant agreed to purchase and pay for certain marble to be used for the interior finish of a post office building, which was offered to show a general custom that such contracts relating to the construction of government buildings always were subject to a condition that samples should be approved by a supervising architect employed by the national government, was held properly to have been excluded, there being no offer to show that the plain-

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tiff had knowledge of the custom and the evidence not tending to show a custom of such general and universal application that the plaintiff must be presumed to have had knowledge of it. *Puffer Manuf. Co.* v. *Yeager*, 557.

Where there was conflicting evidence, at the trial of the action above described, as to whether a written statement of a condition that samples should be approved by the supervising architect was included in a set of plans sent to the plaintiff by the defendant and the judge found for the plaintiff, it was held that this finding must mean that the judge found that no such written statement was furnished to the plaintiff and that the plaintiff had no notice of such a custom; and that, upon such findings, a further finding for the plaintiff was warranted. *Ibid.*

DAMAGES.

For Property taken or damaged under Statutory Authority.

The provision contained in R. L. c. 48, § 17, for the appointment of a trustee to receive damages awarded for the taking of interests in real estate for the laying out or alteration of a highway is intended to apply merely to cases where the only parties in interest are the tenant for life or for years of the whole estate on the one hand and the remainderman or reversioner on the other. *Mills* v. *Samuels*, 1.

The owner of the reversion of real estate taken for the widening of a highway which has been leased under a lease in writing to a general lessee, who has made subleases in writing of different parts of the property to various sublessees, cannot maintain a petition under the provisions of R. L. c. 48, § 17, and the damages awarded must be apportioned under the provisions of §§ 20–24 of the same chapter. *Ibid.*

On a petition under St. 1902, c. 534, § 8, by the lessee of a certain building on Washington Street in Boston for damages sustained in the construction of the Washington Street tunnel apart from the compensation for the taking, by reason of being deprived of the use of the basement of the building during a substantial period of time, it was held that the use of the portion of the basement complained of was, under the circumstances, a necessary incident of the taking, and that the right to damages for such use was barred because the petition was not filed within one year after the property of the petitioner was "so taken or injured" within the requirement of § 8 of the statute. *Briggs* v. *Boston*, 148.

For Breach of Contract.

In an action against a contractor for breach of a building contract requiring fireproofing, where an auditor found "that the defendant knew that said basement was to be used for the storage of dry goods and merchandise," and "that the plaintiff's goods and merchandise in the basement became damp and mouldy due to the absence of waterproofing," it was held proper to refuse to rule at the request of the defendant, that "Even though the defendant knew that the store was to be used for the storage of goods, the plaintiff [defendant] would not be liable for damage thereto because the defendant's act in omitting the waterproofing would not be the proximate cause of such damage." *Dondis* v. *Borden*, 73.

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In Suit in Equity.

Although the general rule in equity as at law is to allow only simple interest by way of damages, yet compound interest sometimes is allowed, and in the present case, where the defendant had been ordered to account for the value of certain stock at a certain date and the case was referred to a master to ascertain the value of the stock at that date, it was held that a ruling of the master was not erroneous, that interest should be computed "from the date of settlement to the date of the filing of the bill, with a rest as of the date of filing the bill and interest thereafter on the principal so ascertained" to the date of the decree. *Arnold* v. *Maxwell*, 441.

In the case above described a decision of this court at a previous stage of the same case had ordered that, in the accounting, interest should be allowed on the whole amount due to the plaintiff "from the date of settlement to the date of filing the bill," and it was pointed out that this was the law of the case. *Ibid.*

DANGEROUS ARTICLE OF MERCHANDISE.

In the absence of negligence, a retail dealer in selling a commodity not inherently harmful or dangerous is not liable in tort for personal injury resulting from its condition. *Barrango* v. *Hinckley Rendering Co.* 93.

Testimony of a driver of a team for a rendering plant, who in behalf of his employer collected soap grease, giving in payment therefor soap which it did not manufacture but acquired from others in the usual course of its business, that sometimes a nail was found in bars of the soap and that he examined them before delivering them to purchasers, is not evidence tending to show that the presence of a needle in a bar of soap given by the driver to a customer was due to negligence of the driver or of his employer. *Ibid.*

The mere fact, that a member of the family of the customer to whom the bar of soap was delivered by the driver, as above described, was injured by a needle embedded in the soap, is not evidence of negligence of the driver or of his employer. *Ibid.*

DEATH.

Where a person is injured by ice falling upon him due to a defective condition of a building and dies within six days without notice thereof having been given in accordance with Sts. 1908, c. 305; 1913, c. 324, in his behalf to the person responsible for the condition of the premises resulting in the injury, a notice given five days after the death of the person so injured by an attorney at law acting on behalf of one who more than a month later was appointed administrator of the estate of the person so injured does not satisfy the requirements of the statute, even if the attorney's act is ratified by the administrator after his appointment. *O'Neil* v. *Squire*, 294.

Declarations of deceased persons as evidence, see appropriate subtitle under EVIDENCE.

Actions for death by wrongful act, see NEGLIGENCE, *Causing Death.*

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DECEIT.

An infant is not liable in tort for deceit by reason of having made false representations that he was of age. *Knudson* v. *General Motorcycle Sales Co. Inc.* 54.

Upon the evidence at the trial of an action of tort by a real estate broker against a real estate dealer and another real estate broker, charging the defendants with having conspired to procure through fraud the payment to the defendant broker of a commission on the purchase of a house by the defendant real estate dealer that really had been earned by the plaintiff but had been relinquished by him induced by the fraud of the defendants, it was held that a finding of such a joint tort committed by the defendants was warranted. *Henry W. Savage, Inc.* v. *Wheelock*, 111.

A person seasonably may rescind a contract which he has been induced to enter into in reliance upon false, though innocent, misrepresentations respecting a cognizable material fact made as of his own knowledge by the other party to the contract. *Bates* v. *Cashman*, 167.

DEED.

Consideration.

A master, to whom was referred a suit in equity by a mother against the executrix of the will of her son to set aside a conveyance made by her to her son, after stating the considerations for the conveyance of the property in question, stated that he was unable to determine the money value of the considerations for the deed, but that they were substantial and valuable and, on an appeal by the plaintiff, it was held that the findings were warranted and that the deed was supported by an adequate consideration. *Parsons* v. *Parsons*, 544.

Validity.

Applying to the facts found by a master the principles of law that a deed from a mother to one of her sons was not *prima facie* void but that the presumption was in favor of its validity, and that, in order to set it aside, the court must be satisfied that it was not the voluntary act of the mother, it was held that there was no sound ground for holding that there was fraud as matter of law in the giving of the deed. *Parsons* v. *Parsons*, 544.

Incomplete.

In a suit in equity against the executor of a will to have a deed of the plaintiff to the defendant's testator set aside because it was procured by fraud and undue influence, was voluntary and without consideration and was incomplete in that it bore no seal, it is proper for the defendant to file a cross bill against the plaintiff alleging that the deed was supported by an adequate and valuable consideration, was valid, and that the omission of the seal was due to accident. *Parsons* v. *Parsons*, 544.

And, upon findings of a master, warranted by the evidence, sustaining such allegations, a decree may be entered directing that the deed be completed by the affixing of a proper seal. *Ibid.*

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Construction.

In an action of contract on a covenant of warranty in a deed to the plaintiff from the defendant, it appeared that the defendant had acquired title by a deed which recited that the consideration was paid by her, that in the granting clause the word "said" was followed by the name of her husband, while the habendum clause ran to her by name and "his" heirs and assigns, and it was held that the intention of the parties to vest the title in the defendant was clear and that the plaintiff was not entitled to recover on the warranty. *Goodman* v. *Telfer*, 157.

In the same case it was held that the manifest clerical error of writing "his" instead of "her" in the habendum clause did not affect the validity of the conveyance. *Ibid.*

A deed conveying land is to be construed so as to vest the title in accordance with the intention of the parties as it appears from the whole instrument unless this is contrary to established principles of law. *Ibid.*

DEVISE AND LEGACY.

Validity.

By the clause, "All the remainder of my estate . . . I give, bequeath and devise to my executors and trustees, in whose honesty and discretion I have reposed especial trust and confidence, for certain purposes which I have made known to them. And I hereby authorize and empower my said executors to make such distribution and division of my estate as I have indicated to them, and as they shall deem proper for the fulfillment of my wishes so well known to them relying entirely upon their judgment in the premises," the residue was held not to be given to the executors absolutely, but that a trust was attempted to be created, which was not for a charitable purpose and was wholly undefined, so that no valid gift was made and the residue was to be treated as intestate property. *Blunt* v. *Taylor*, 303.

What Property.

A devise and bequest of a testator to his wife of one third part of the real and personal property "belonging to me and standing in my name, but no part of the real or personal property held by me as executor or trustee of the estate of my mother" entitles the widow to no right to share in certificates of stock and mortgages which the testator before his death transferred and assigned to himself as the executor of his mother's will. *Redman* v. *Churchill*, 415.

Residue Clause.

Application of the rule, that a legacy which is a part of a residue lapses on the death of the legatee before its vesting and cannot again fall into the residue, where the residue clause was placed in trust to pay one third of the income to the widow for life and certain sums to a nephew and a niece and the balance was to be divided between the nephew and the niece, and the widow waived the provisions for her and the nephew died leaving the widow surviving. *Crocker* v. *Crocker*, 478.

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In the case above described it was pointed out that the will disclosed no reason for invoking the rule, which sometimes is called inaccurately the satisfaction of disappointed legatees, as illustrated by Shreve *v.* Shreve, 176 Mass. 456. *Crocker* v. *Crocker*, 478.

Identity of Legatee.

Upon the construction of the will of a testator, whose only sister of the whole blood had died before him and who left surviving him four brothers of the whole blood and six brothers and two sisters of the half blood, leaving his residuary estate "in equal shares to my several brothers and my sister," it was held under the circumstances that the testator's use of the word "sister" showed his intention to confine his gift to his kindred of the whole blood. *Mullaney* v. *Monahan*, 245.

Exercise of Power of Appointment.

See POWER.

Rule against Perpetuities.

See PERPETUITIES, RULE AGAINST.

Contract to make a Legacy.

The provisions of R. L. c. 74, § 6, prevent the maintenance of an action of contract by an attorney at law against the executor of a will to enforce an oral agreement by the defendant's testator to bequeath to the plaintiff a certain sum of money in payment for services at that time already rendered and to be rendered to the testator by the plaintiff as an attorney at law. *Runyan* v. *Van Iderstine*, 428.

Construction of testamentary trusts, see appropriate subtitle under TRUST.

DICTOGRAPH.

At the trial of an indictment for manslaughter against a man, a witness, who is not an electric or telephone expert, may be permitted to describe the parts, produced in court and identified by him, of a dictograph apparatus installed by him in cells where the defendant and his wife were confined and to describe the way in which the apparatus was arranged and was connected in another room with a receiver used by a person to overhear conversations between the defendant and his wife. *Commonwealth* v. *Wakelin*, 567.

A witness who, by means of such dictograph, overheard conversations between the defendant and his wife which were upon matters material to the issues on trial, and who testifies that he recognized their respective voices, may be permitted to state what he heard, the question, what weight should be given to the testimony, being for the jury. *Ibid.*

The circumstances, that the conversations so overheard were between husband and wife when physically alone, is no ground for objection to the admissibility of the evidence, R. L. c. 175, § 20, cl. 1, not being applicable and there being no rule of law that a third person who overhears a conversation

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between a husband and his wife, intended to be private, may not testify what it was. *Commonwealth* v. *Wakelin*, 567.

DISTRICT ATTORNEY.

Where an indictment charges that the defendant "did assault and beat W with intent to murder her, and by such assault and beating did murder W," the district attorney has power to enter a *nolle prosequi* as to so much of the indictment as charged a crime greater than manslaughter. *Commonwealth* v. *Wakelin*, 567.

DISTRICT COURTS.

See POLICE, DISTRICT AND MUNICIPAL COURTS.

DIVORCE.

See MARRIAGE AND DIVORCE.

EASEMENT.

Suit in equity to enjoin obstruction of private right of way. *Zimmerman* v. *Finkelstein*, 17.

ELECTION.

Failure of a customer of a stockbroker to repudiate improper sales by the stockbroker to himself of certain securities held by him for the customer on margin was held to have ratified the sales. *Hall* v. *Paine*, 62.

ELECTRICITY.

Liability for negligence in the use of electricity, see appropriate subtitle under NEGLIGENCE.

EMINENT DOMAIN.

Assessment of damages for property taken or impaired under statutory authority, see appropriate subtitle under DAMAGES.

EMPLOYER'S LIABILITY.

See appropriate subtitle under NEGLIGENCE; see also WORKMEN'S COMPENSATION ACT.

EQUITABLE RESTRICTIONS.

In a suit in equity by the owner of a lot on a plan to compel the owner of the adjoining lot to remove a house which he had built in violation of the restrictions contained in his deed, a statement, in a report of the trial judge, that the plaintiff "as the owner of one of the lots is a person for whose benefit the restrictions were imposed, and is entitled to a mandatory injunction,"

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was held necessarily to imply a finding that the original owner imposed the same restrictions on each of the lots on a street shown on the plan as a part of the general scheme of improvement and for the benefit of the purchasers of the several lots. *Maclary* v. *Morgan*, 80.

Circumstances under which a purchaser of a lot shown on a plan can maintain a suit in equity for a mandatory injunction against the owner of an adjoining lot, who was one of the original grantees, ordering him to remove a two-family house which he has erected on his lot nearer than five feet to the boundary line in violation of restrictions contained in his deed. *Ibid.*

EQUITY JURISDICTION.

Estoppel.

A defendant in a suit in equity for the specific performance of a contract is not estopped to rely upon one good defence, among others urged, merely because he has not always put it forward, where it does not appear that he has acted dishonestly in presenting his reasons for declining to perform the contract or that the plaintiff has been misled to his harm. *Bates* v. *Cashman*, 167.

To impress Fund with Trust.

In a suit in equity brought by the trustees of a land trust against a bank to impress with a trust funds of the plaintiffs deposited with the defendant by a dishonest employee of the plaintiffs in his own name and afterwards wholly withdrawn and misappropriated by him, the dishonest employee has no interest in the subject matter of the suit and is not a necessary party. *Kendall* v. *Fidelity Trust Co.* 238.

In a suit in equity by the trustees of a land trust against a trust company, seeking to impress with a trust funds deposited with the defendant by the plaintiffs' assistant treasurer, a dishonest agent, it was held under the circumstances that, as the defendant had no interest in the deposits and never had received any part of them for the payment of any debt to it, the defendant could not be charged with constructive notice of the fraudulent conduct of the depositor, and accordingly that there was no evidence that the defendant knew that the depositor intended to misappropriate the funds, and that the plaintiff was entitled to no relief against it. *Ibid.*

Specific Performance of Contract.

A suit for the specific performance of a contract to purchase capital stock and bonds of a corporation cannot be maintained where it appears that the defendant was induced to make the contract by false, though innocent, misrepresentations respecting a cognizable material fact made as of his own knowledge by the plaintiff. *Bates* v. *Cashman*, 167.

A defendant in a suit in equity for the specific performance of a contract is not estopped to rely upon one good defence, among others urged, merely because he has not always put it forward, where it does not appear that he has acted dishonestly in presenting his reasons for declining to perform the contract or that the plaintiff has been misled to his harm. *Ibid.*

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To relieve from Results of Fraud.

In a suit in equity by a dealer in white and manila paper against the former manager of the plaintiff's manila department and a corporation of which he had obtained control at the time that he severed his connection with the plaintiff, for an accounting, on findings made by a master it was held that there was no evidence to support allegations of fraud, conspiracy and breach of fiduciary duty contained in the plaintiff's bill and that the bill should be dismissed as against both defendants. *Lindsay* v. *Swift*, 407.

In a suit in equity by a mother against the executrix of the will of a son to whom during his life she had conveyed certain real estate, to have the conveyance set aside, it was held that the relationship of parent and child did not preclude business relations between them. *Parsons* v. *Parsons*, 544.

Statement of the rule for determining the validity of such transactions. *Ibid.*

Upon application of the rule, it was held that the conveyance was for a good consideration and was valid. *Ibid.*

To redeem from Mortgage.

It was held that a bill in equity might be maintained by one partner against his copartner for an accounting and for redemption from mortgages of real estate held by one of the defendants, although there had not been a previous tender, if the bill contained an offer of the plaintiff to pay what might be found to be due upon the mortgages and a prayer for an order of redemption. *Skolnick* v. *Greenburg*, 359.

In view of the allegations in such a bill, it was held that it was not multifarious, the two subjects of the partnership accounting and the redemption of the real estate from the mortgages being sufficiently connected with one another to allow their joinder in one bill. *Ibid.*

To invalidate Foreclosure Sale.

A suit in equity to have a second mortgage of real estate declared invalid because procured by fraud, to have a sale in foreclosure declared invalid because the plaintiff, the mortgagor, was not notified and the sale was carried out by a fraudulent conspiracy in which the purchaser shared, and to permit the plaintiff to redeem, properly was dismissed where it appeared from findings of a master confirmed by the trial judge that the facts were not as alleged in the bill. *Ananian* v. *Melkon*, 322.

Accounting.

The holder of a third mortgage on real estate may maintain a suit in equity against the holder of a second mortgage on the same property, who has foreclosed his mortgage and has become the purchaser of the property at the foreclosure sale but who has refused to complete the foreclosure by making a deed to himself under a power contained in the second mortgage, to compel the defendant to pay to the plaintiff the surplus of the purchase

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money after the satisfaction of the debt to the defendant secured by the second mortgage. *Pilok* v. *Bednarski*, 56.

A bill in equity by one partner against his two copartners in conducting theatrical entertainments and moving picture exhibits in a building erected by them on certain land belonging to the three, subject to certain mortgages, for a partnership accounting was upheld on demurrer as stating a ground for relief against the two defendants, although the allegations were vague and general. *Skolnick* v. *Greenburg*, 359.

In a suit in equity by a dealer in white and manila paper against the former manager of the plaintiff's manila department and a corporation of which he had obtained control at the time that he severed his connection with the plaintiff, for an accounting, on findings made by a master it was held that there was no evidence to support allegations of fraud, conspiracy and breach of fiduciary duty contained in the plaintiff's bill and that the bill should be dismissed as against both defendants. *Lindsay* v. *Swift*, 407.

Although the general rule in equity as at law is to allow only simple interest by way of damages, yet compound interest sometimes is allowed, and in the present case, where the defendant had been ordered to account for the value of certain stock at a certain date and the case was referred to a master to ascertain the value of the stock at that date, it was held that a ruling of the master was not erroneous, that interest should be computed "from the date of settlement to the date of the filing of the bill, with a rest as of the date of filing the bill and interest thereafter on the principal so ascertained" to the date of the decree. *Arnold* v. *Maxwell*, 441.

In the case above described a decision of this court at a previous stage of the same case had ordered that, in the accounting, interest should be allowed on the whole amount due to the plaintiff "from the date of settlement to the date of filing the bill," and it was pointed out that this was the law of the case. *Ibid.*

Accounting between partners, see PARTNERSHIP.

To relieve from Results of Breach of Fiduciary Relation.

In a suit in equity by a dealer in white and manila paper against the former manager of the plaintiff's manila department and a corporation of which he had obtained control at the time that he severed his connection with the plaintiff, for an accounting, on findings made by a master it was held that there was no evidence to support allegations of fraud, conspiracy and breach of fiduciary duty contained in the plaintiff's bill and that the bill should be dismissed as against both defendants. *Lindsay* v. *Swift*, 407.

To reach and apply Equitable Assets and Shares of Stock in Corporation.

A breach of an executory contract of service by the principal defendant, the claim of damages for which has not been reduced to a judgment, is not a debt on which a suit in equity to reach and apply equitable assets in payment of an alleged debt to the plaintiff, under R. L. c. 159, § 3, cl. 7, as amended by St. 1902, c. 544, § 23, and St. 1910, c. 531, § 2, can be founded. *Stone, Timlow & Co. Inc.* v. *Stryker*, 67.

Under St. 1910, c. 531, § 2, a suit cannot be maintained to reach and apply a certificate of shares in a certain corporation in the possession of the principal defendant but standing in the name of another person, whose name is

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indorsed upon the back of the certificate, if the certificate contains a provision making it subject to a by-law by which shares in the corporation can be transferred only by offering them first to the directors of the corporation, who have the right to buy them at their book value. *Stone, Timlow & Co. Inc.* v. *Stryker*, 67.

To reach and apply Liability Insurance toward Satisfaction of Judgment for Bodily Injury or Death.

In a suit in equity under St. 1914, c. 464, by one who had recovered judgment against certain bridge builders for bodily injuries, to reach casualty insurance in a certain insurance company and apply it to the satisfaction of such judgment, it was held that a requirement of the insurance policy as to notice by the insured to the company had not been complied with by the insured, who had assumed from the fact that the plaintiff had gone back to his work and had made no complaint that his injury was a trifling one; and, the policy having required immediate notice of the occurrence of an accident, regardless of any claim for damages or the amount of damages sustained, and such requirement being a reasonable one, the suit was dismissed. *McCarthy* v. *Rendle*, 35.

In the case above described it was pointed out that the fact, that the person injured had a reasonable and *bona fide* doubt as to the existence of any injury or any liability, could not deprive the insurer of its contractual right under the policy to have immediate notice of the occurrence of an accident regardless of any claim that might be founded on it. *Ibid.*

To complete Deed.

In a suit in equity against the executor of a will to have a deed of the plaintiff to the defendant's testator set aside because it was procured by fraud and undue influence, was voluntary and without consideration and was incomplete in that it bore no seal, it is proper for the defendant to file a cross bill against the plaintiff alleging that the deed was supported by an adequate and valuable consideration, was valid, and that the omission of the seal was due to accident. *Parsons* v. *Parsons*, 544.

And upon findings of a master, warranted by the evidence, sustaining such allegations, a decree may be entered directing that the deed be completed by the affixing of a proper seal. *Ibid.*

To enjoin Obstruction of Private Way.

The owner of the fee in a passageway on which his building abuts may maintain a suit in equity against the owner of a building on the opposite side of the passageway for a mandatory injunction ordering the defendant to remove from his building fire escapes overhanging the plaintiff's land, without joining as parties other persons who have rights of way in the passageway but have no interest in the fee. *Zimmerman* v. *Finkelstein*, 17.

Suit against Foreign Mutual Insurance Company.

By reason of the provisions of a certain policy of life insurance issued by a mutual life insurance company incorporated in the State of New York and because the policy must be construed according to the laws of the

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State of New York, it was held that the courts of this Commonwealth would not take jurisdiction of a suit in equity by a citizen of the Commonwealth against the company to determine the amount which should be paid by the plaintiff as premiums, to restrain the defendant from declaring the policy forfeited and to compel it to accept a certain amount as full payment of premiums instead of a larger amount fixed by a vote of the directors of the corporation. *Richards* v. *Security Mutual Life Ins. Co.* 320.

Partnership Matters.

See PARTNERSHIP.

Equity treats that as done that ought to have been done.

The holder of a third mortgage on real estate may maintain a suit in equity against the holder of a second mortgage on the same property, who has foreclosed his mortgage and has become the purchaser of the property at the foreclosure sale but who has refused to complete the foreclosure by making a deed to himself under a power contained in the second mortgage, to compel the defendant to pay to the plaintiff the surplus of the purchase money after the satisfaction of the debt to the defendant secured by the second mortgage. *Pilok* v. *Bednarski*, 56.

To enforce Constructive Trust.

See TRUST, *Constructive.*

Damages.

See DAMAGES, *In Suit in Equity.*

EQUITY PLEADING AND PRACTICE.

Indorser of Bill.

Under R. L. c. 173, § 39, one who writes his name on the back of a bill in equity brought by a plaintiff not an inhabitant of this Commonwealth becomes an indorser liable for costs. *Bird* v. *Johnston*, 28.

Scire facias for the collection of such costs. *Ibid.*

Parties.

The owner of the fee in a passageway on which his building abuts may maintain a suit in equity against the owner of a building on the opposite side of the passageway for a mandatory injunction ordering the defendant to remove from his building fire escapes overhanging the plaintiff's land, without joining as parties other persons who have rights of way in the passageway but have no interest in the fee. *Zimmerman* v. *Finkelstein*, 17.

In a suit in equity brought by the trustees of a land trust against a bank to impress with a trust funds of the plaintiffs deposited with the defendant by a dishonest employee of the plaintiffs in his own name and afterwards wholly withdrawn and misappropriated by him, the dishonest employee has no interest in the subject matter of the suit and is not a necessary party. *Kendall* v. *Fidelity Trust Co.* 238.

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Bill.

A bill in equity by one partner against his two copartners in conducting theatrical entertainments and moving picture exhibits in a building erected by them on certain land belonging to the three, subject to certain mortgages, for a partnership accounting was upheld on demurrer as stating a ground for relief against the two defendants, although the allegations were vague and general. *Skolnick* v. *Greenburg*, 359.

Where the bill above described joined another defendant, who was alleged to hold title to two undivided thirds of the real estate in trust for the two defendants alleged to be partners, but there was no allegation that the real estate was any part of the partnership assets legal or equitable, it was held that no case was set out connecting the third defendant with the partnership and that as to the third defendant the bill should be dismissed. *Ibid.*

In the case above described a certain paragraph in the bill, to which the defendants specially demurred on the ground of indefiniteness, was held to be bad because it did not intelligibly inform the defendants what charges they were to answer. *Ibid.*

It was held that a bill in equity might be maintained by one partner against his copartner for an accounting and for redemption from mortgages of real estate held by one of the defendants, although there had not been previous tender, if the bill contained an offer of the plaintiff to pay what might be found to be due upon the mortgages and a prayer for an order of redemption. *Ibid.*

In view of the allegations in such a bill, it was held that it was not multifarious, the two subjects of the partnership accounting and the redemption of the real estate from the mortgages being sufficiently connected with one another to allow their joinder in one bill. *Ibid.*

Cross Bill.

In a suit in equity against the executor of a will to have a deed of the plaintiff to the defendant's testator set aside because it was procured by fraud and undue influence, was voluntary and without consideration and was incomplete in that it bore no seal, it is proper for the defendant to file a cross bill against the plaintiff alleging that the deed was supported by an adequate and valuable consideration, was valid, and that the omission of the seal was due to accident. *Parsons* v. *Parsons*, 544.

Rules of Court.

Equity Rule 31. *Arnold* v. *Maxwell*, 441.

Master.

Objections and exceptions to report.

Where a suit in equity is referred to a master, to whose report the plaintiff files twenty objections and exceptions, the twentieth being an exception to a refusal to admit certain testimony, and, after a hearing, a judge files a memorandum stating that he sustained the seventeenth and overruled the other exceptions, and an interlocutory decree is entered sustaining the

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seventeenth exception and recommitting the suit to the master as to certain matters therein mentioned, from which decree no appeal is taken, if, after the filing of the master's supplemental report the suit is heard upon the master's reports and a final decree is entered confirming the reports and dismissing the bill, from which the plaintiff appeals, there is not brought to this court by such an appeal the question whether the exceptions of the plaintiff to the master's report should be sustained. *Ananian* v. *Melkon*, 322.

In this case, it appearing that the rule of reference of the suit to the master did not direct him to report any evidence, it was said that, all the exceptions other than the twentieth and the seventeenth being to findings of fact and to refusals to report evidence, they were overruled properly. *Ibid.*

The twentieth exception was to a refusal of the master to admit in rebuttal testimony of a witness to the effect that the plaintiff previous to the bringing of the suit made statements to the witness consistent with those as to which he testified at the hearing; and it was said that the exclusion of the testimony was proper. *Ibid.*

An objection at a hearing before a master in a suit in equity to the admission of certain evidence cannot be made the foundation of an exception to the master's report on the ground of his admission of the evidence, if the party attempting thus to except to the master's report failed to file an objection in writing as required by Equity Rule 31 after notice of the preparation of the master's draft of his report. *Arnold* v. *Maxwell*, 441.

Report of evidence.

Where a suit in equity is referred to a master under a rule directing him "to hear the parties and their evidence, to find the facts, and report the same to the court," the master has no authority to transmit to the court at the request of one of the parties certain portions of the evidence which the master has refused to make a part of his report. *Lindsay* v. *Swift*, 407.

Where in such a case portions of the evidence are transmitted by the master without an order of court directing it, they cannot be considered. *Ibid.*

Findings of fact.

On a petition under R. L. c. 163, § 13, to enter late an appeal from a decree of the Probate Court denying a petition to be appointed the administrator *de bonis non* of the estate of a certain intestate on the ground that the petitioner was the son and the only living heir of the intestate, the master having found, on evidence not reported, that the petitioner was not the son of the intestate, it was held that the petition was dismissed rightly. *Phillips* v. *Phillips*, 14.

Findings by Judge.

Findings by a judge of the Superior Court allowing certain charges for compensation to a receiver and his attorney were held not improper. *Shannon* v. *Shepard Manuf. Co. Inc.* 224.

A finding of a judge who heard a suit in equity against a corporation for five years' salary as "supervisor" alleged to be due to the plaintiff in accordance with a vote of the directors of the defendant, was interpreted, upon an appeal from a final decree dismissing the bill, to be a finding to the effect that the vote of the directors was passed with an agreement between them

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and the plaintiff that it should not be binding upon the defendant; and it therefore was held that the suit must be dismissed. *McCormick* v. *Commercial Brewing Co.* 289.

The ruling of the judge that the directors had no power to pass the vote in question was held to have been erroneous; but it also was held that, in view of the judge's finding, the error was immaterial. *Ibid.*

The question, whether further findings of the judge as to the secret and fraudulent character of the vote were warranted, also was held in view of the finding above described, to have been immaterial. *Ibid.*

Costs.

Under R. L. c. 173, § 39, one who writes his name on the back of a bill in equity brought by a plaintiff not an inhabitant of this Commonwealth becomes an indorser liable for costs. *Bird* v. *Johnston*, 28.

Scire facias for the collection of such costs. *Ibid.*

Report.

In a suit in equity by the owner of a lot on a plan to compel the owner of the adjoining lot to remove a house which he had built in violation of the restrictions contained in his deed, a statement, in a report of the trial judge, that the plaintiff "as the owner of one of the lots is a person for whose benefit the restrictions were imposed, and is entitled to a mandatory injunction," was held necessarily to imply a finding that the original owner imposed the same restrictions on each of the lots on a street shown on the plan as a part of the general scheme of improvement and for the benefit of the purchasers of the several lots. *Maclary* v. *Morgan*, 80.

Appeal.

Interpretation, on an appeal from a final decree dismissing a bill in equity, of certain findings of the trial judge, and determination that other findings were immaterial although erroneous. *McCormick* v. *Commercial Brewing Co.* 289.

Where a suit in equity is referred to a master, to whose report the plaintiff files twenty objections and exceptions, the twentieth being an exception to a refusal to admit certain testimony, and, after a hearing, a judge files a memorandum stating that he sustained the seventeenth and overruled the other exceptions, and an interlocutory decree is entered sustaining the seventeenth exception and recommitting the suit to the master as to certain matters therein mentioned, from which decree no appeal is taken, if, after the filing of the master's supplemental report the suit is heard upon the master's reports and a final decree is entered confirming the reports and dismissing the bill, from which the plaintiff appeals, there is not brought to this court by such an appeal the question whether the exceptions of the plaintiff to the master's report should be sustained. *Anania* v. *Melkon*, 322.

Law of the Case.

In a suit in equity for an accounting a decision of this court at a previous stage of the same case had ordered that, in the accounting, interest should

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be allowed on the whole amount due to the plaintiff "from the date of settlement to the date of filing the bill," and it was pointed out that this was the law of the case. *Arnold* v. *Maxwell*, 441.

Proceedings in Divorce Libels.

Although libels for divorce are not suits in equity but belong on the law side of the court and the Superior Court sitting to hear them has not general equity powers, yet by R. L. c. 152, § 29, that court "may, if the course of proceeding is not specially prescribed, hear and determine all matters coming within the purview of this chapter [relating to divorce] according to the course of proceeding . . . in courts of equity." *Friedrich* v. *Friedrich*, 59.

ERROR, WRIT OF.

See Writ of Error.

ESTOPPEL.

In an action of scire facias against the indorser of a bill in equity for costs ordered to be paid by the plaintiff in such suit, the defendant in scire facias is bound conclusively by the record in the suit in equity. *Bird* v. *Johnston*, 28.

Where, therefore, the bill that he indorsed describes the plaintiff in equity as a resident of another State, the defendant at the trial of the scire facias cannot be allowed to show that the plaintiff in the suit in equity was an inhabitant of this Commonwealth when the bill in equity was filed. *Ibid.*

In such an action of scire facias a finding of the jury in answer to a special question of the court, that the plaintiff in the suit in equity was an inhabitant of this Commonwealth at the time of the filing of the bill, must be disregarded as of no effect. *Ibid.*

An infant is not estopped to deny a recital "that he is at least twenty-one years of age" contained in a contract in writing signed by him that he seeks to avoid. *Knudson* v. *General Motorcycle Sales Co. Inc.* 54.

A defendant in a suit in equity for the specific performance of a contract is not estopped to rely upon one good defence, among others urged, merely because he has not always put it forward, where it does not appear that he has acted dishonestly in presenting his reasons for declining to perform the contract or that the plaintiff has been misled to his harm. *Bates* v. *Cashman*, 167.

A statement of an attorney at law for a petitioner to enforce a mechanic's lien to a stranger, to the effect that the execution and delivery of a bond to dissolve the lien, which bond is unrecorded, dissolved the lien, is merely an expression of an opinion on a question of law, and, even if authorized by his client, will not operate to estop the client from prosecuting his lien. *Goldstein* v. *Tucker*, 259.

Where the owner of certain land executed and delivered to a petitioner for the establishment of a mechanic's lien upon the land a bond to dissolve the lien with sureties properly approved, and the petitioner thereupon told one who proposed to purchase the land that the lien was discharged and waived by the giving of the bond but the bond was not recorded within

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ten days as required by R. L. c. 197, § 28, as amended by Sts. 1906, c. 223; 1909, c. 237, and the land was purchased, it was held that under the circumstances the petitioner had not thereby waived his lien, nor was he estopped, by reason of his representation based on a false idea as to the law, from pursuing his petition to judgment and sale. *Goldstein* v. *Tucker*, 259.

Whether a certain letter of an architect, accepting a building subject to certain defects which the builder was to remedy and which were remedied, under all the circumstances operated as a waiver of the right of the owner to insist upon the architect's final certificate, and, if it did so operate, whether the owner thereby was precluded from claiming in recoupment damages for defective workmanship or materials, were not raised by the record. *Hennebique Construction Co.* v. *Boston Cold Storage & Terminal Co.* 456.

EVIDENCE.

Judicial Notice.

In interpreting a correspondence between a manufacturing corporation in this country through its agent in Norway and a firm of merchants in Sweden, which took place a few weeks after the outbreak of the great war, it was said that in general the court will take judicial notice of the disturbance of commercial relations between neutral countries dependent upon navigation in the zone affected by that war. *Kehlor Flour Mills Co.* v. *Linden*, 119.

Presumptions and Burden of Proof.

Verdict for the defendant in an action for personal injuries was held rightly to have been ordered, where the plaintiff admitted that he executed and delivered a release and there was no evidence warranting a finding that the release was made voidable by reason of fraud. *Walsh* v. *Fore River Shipbuilding Co.* 89.

In a claim by a dependent widow under the workmen's compensation act, the arbitration committee found that "the arbitrators are unable to determine what was the cause of [his] death, this being wholly a matter of conjecture, and, therefore, are unable to find that [his] death . . . arose out of his employment," and, this finding being adopted by the Industrial Accident Board, it was held that it was warranted by the evidence. *Murphy's Case*, 99.

The evidence at the trial of an action for causing the conscious suffering and death of one, who, when in a motor boat in tidal waters, was struck by a portion of a pier which fell upon him, was held not to warrant a finding of conscious suffering, it being wholly a matter of surmise and conjecture whether there was such suffering or not. *Fuller* v. *Andrew*, 139.

It was pointed out that in a claim under the workmen's compensation act by the alleged dependent widow of an employee, if the widow was living with her husband at the time of his death, the presumption created by St. 1911, c. 751, Part II, § 7, (*a*), that she was wholly dependent upon her husband's earnings for support, is made conclusive and cannot be affected by any proof of facts to the contrary. *Bott's Case*, 152.

Upon the evidence at the trial of an action by an employee of a wrecking company against the owner of a mill for personal injuries it was held that

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findings were warranted, either that a chisel left upon a plank between two upright boilers fell with the plank and struck the plaintiff, or that the workman of the owner as he ascended the ladder dropped a chisel upon the plaintiff; and that, whichever was the cause determined upon by the jury, a further finding was warranted that the plaintiff's injuries were due to negligence for which the defendant might be found to be responsible. *Heuser* v. *Tileston & Hollingsworth Co.* 299.

A finding of the jury for the plaintiff at the trial of the action above described could not be said as a matter of law to be based upon conjecture, but was warranted by reasonable inferences from facts which might have been found to exist. *Ibid.*

Upon the evidence at the trial of an action against a street railway corporation by an experienced lineman for personal injuries sustained in the year 1907 when in the defendant's employ, by falling from a pole by reason of coming in contact with the defendant's telephone wires charged with a dangerous current of electricity passed to them from high tension wires maintained by the defendant on another cross arm, it was held that there was no evidence of negligence for which the defendant was liable, it being equally probable that the defendant was not at fault or that the dangerous condition was caused by a fellow servant of the plaintiff for whose negligence the defendant was not legally accountable to the plaintiff. *Murphy* v. *Old Colony Street Railway*, 333.

On the evidence at the trial of an action by an administrator of the estate of his mother against his sister for money alleged to have been "received and borrowed" by the defendant from her mother, it was held that a finding for the plaintiff was not warranted and a verdict properly might be ordered for the defendant. *Harrington* v. *Cousins*, 366.

St. 1914, c. 553, § 1, does not change the substantive law of negligence. *Duggan* v. *Bay State Street Railway*, 370.

The provisions of St. 1914, c. 553, § 1, do not require necessarily that in every action therein described, when tried before a jury, the due care of the person who was injured or damaged or whose death was caused becomes a question of fact which must be submitted to the jury. *Ibid.*

Where from facts, which are undisputed or indisputable or are shown by evidence by which the plaintiff is bound, only one rational inference can be drawn and that is an inference of contributory negligence or want of due care, then the question of due care or contributory negligence is one of law for the court and a verdict for the defendant should be ordered. *Ibid.*

Detailed statement of the changes wrought by the provisions of St. 1914, c. 553, § 1, that "In all actions, civil or criminal, to recover damages for injuries to the person or property or for causing the death of a person, the person injured or killed shall be presumed to have been in the exercise of due care," in the rules of law previously in force in actions for injury to person or property through negligence and in actions for the negligent causing of death. *Ibid.*

Effect of the further provision of the same section of the statute, that contributory negligence on the part of a person, who has been so injured or killed or whose property has been damaged, "shall be an affirmative defence to be set up in the answer of, and proved by the defendant." *Ibid.*

The inference of due care on the part of the plaintiff or decedent in the actions

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described in the above statute, which by the statute is made a presumption of fact, is not arbitrary nor irrational. *Duggan* v. *Bay State Street Railway*, 370.

St. 1914, c. 553, as above construed, does not contravene any provision of the Constitution of the Commonwealth or of the Fourteenth Amendment to the Federal Constitution. *Ibid.*

In an action of tort for personal injuries, where the defence of contributory negligence is set up in the answer and the evidence shows that the plaintiff necessarily must have been negligent, St. 1914, c. 553, does not require the submission of the case to the jury. *Pigeon* v. *Massachusetts Northeastern Street Railway*, 392.

On the evidence at the trial of four actions of tort against a street railway corporation for personal injuries sustained after the enactment of St. 1914, c. 553, by being run into by an electric street railway car of the defendant when the plaintiffs were travelling in a motor butcher cart driven by one of them, it was held that the only reasonable conclusion was that the negligent conduct of each of the plaintiffs helped to bring on the accident, so that a verdict rightly was ordered for the defendant in each of the cases. *Ibid.*

In the cases above described it was held that, although the absence of an operating license was some evidence of negligence on the part of this plaintiff in operating the car, it was not conclusive and did not warrant the ordering of a verdict for the defendant as against that plaintiff, and, in deciding on other evidence that all the plaintiffs were negligent as matter of law, this court did not consider as an element the absence of an operating license. *Ibid.*

On the evidence at the trial of an action by an administrator against a street railway corporation under St. 1906, c. 463, Part I, § 63, as amended by St. 1907, c. 392, for causing the death of the plaintiff's intestate after he had alighted from a car of the defendant by his being struck and instantly killed by another car of the defendant coming on a parallel track from the opposite direction, it was held that, although, if the accident had happened before the passage of St. 1914, c. 553, there would have been no evidence to go to the jury on this issue, yet, with the presumption created by the statute and the burden placed on the defendant to prove contributory negligence, it could not be ruled as matter of law that the negligence of the intestate contributed to his death, and the question of his negligence was for the jury. *Mercier* v. *Union Street Railway*, 397.

It cannot be ruled as matter of law that a child six years of age is too young to be alone and unattended upon a highway in a city and to pass from one side of a street to the other while on the way to and from school. *Miller* v. *Flash Chemical Co.* 419.

In an action by a girl against a corporation to recover for personal injuries received by her when six years of age by being run into by a motor vehicle as she was crossing a street in a city on the way home from school after she had slipped away from a child in whose charge she had been put, the question, whether the plaintiff was of an age capable of exercising due care for her own safety, is for the jury. *Ibid.*

The mere fact, that the plaintiff, in the action above described, "never went alone to and from school but always was accompanied by some older person,"

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does not conclusively establish the fact that the plaintiff was not capable of exercising due care for her own safety. *Miller* v. *Flash Chemical Co.* 419.

The fact that a railroad corporation, without being ordered so to do by the railroad commissioners or the public service commission under St. 1906, c. 463, Part II, § 151, voluntarily assumed the duty of maintaining a bell operated by an electrical appliance to warn the public against the danger of cars and engines approaching a grade crossing of the railroad with a highway, does not warrant an inference that it also assumed the duty of so warning the public against the danger of collision with a car standing still on the track at the crossing at night, or that the mechanism was intended for that purpose. *McGlauflin* v. *Boston & Maine Railroad*, 431.

Where, at the trial of an action by a woman against the owner of a building in a city for personal injuries alleged to have been received when a piece of ice fell from the building upon the plaintiff, the plaintiff testified in direct examination that the ice fell from the building but later in her testimony made statements conflicting with this, it was held that it was for the jury to choose between these contradictory statements, and that a finding was warranted that the ice fell from the roof of the defendant's building. *Connors* v. *Richards*, 436.

In a claim under the workmen's compensation act a finding of fact, made by the Industrial Accident Board on evidence warranting such a finding in the exercise of their right to disbelieve any part of the evidence which in their opinion was not entitled to credit, is not open to review by this court on an appeal from a decree affirming the decision of the board. *Fitzgibbons's Case*, 473.

The presumption that, where the owner of a tract of land conveys to another a part of it from which no right of way to a public way exists unless there be one over land of the grantor, such a way over the grantor's land is intended to be and is included in the grant, may be rebutted by evidence tending to show that the grantor's intention, understood by the grantee, was that there should be no such way over his remaining land but that the grantee should use a way over land then owned and occupied by the grantee's wife. *Orpin* v. *Morrison*, 529.

Applying to the facts found by a master the principles of law that a deed from a mother to one of her sons was not *prima facie* void but that the presumption was in favor of its validity, and that, in order to set it aside, the court must be satisfied that it was not the voluntary act of the mother, it was held that there was no sound ground for holding that there was fraud as matter of law in the giving of the deed. *Parsons* v. *Parsons*, 544.

Applications of the doctrine, *res ipsa loquitur*, see appropriate subtitle under NEGLIGENCE.

Matters of Conjecture.

Where a scrubwoman employed in a hotel was injured by falling when descending a properly lighted flight of stairs in the hotel building by reason of stepping on some "sort of slippery refuse . . . like grease," her employer is not liable for her injury if there is nothing to show how or when the object on which the woman slipped came upon the stairs. *Zugbie* v. *J. R. Whipple Co.* 19.

In a claim by a dependent widow under the workmen's compensation act, the arbitration committee found that "the arbitrators are unable to deter-

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mine what was the cause of [his] death, this being wholly a matter of conjecture, and, therefore, are unable to find that [his] death . . . arose out of his employment," and, this finding being adopted by the Industrial Accident Board, it was held that it was warranted by the evidence. *Murphy's Case*, 99.

The evidence at the trial of an action for causing the conscious suffering and death of one, who, when in a motor boat in tidal waters, was struck by a portion of a pier which fell upon him, was held not to warrant a finding of conscious suffering, it being wholly a matter of surmise and conjecture whether there was such suffering or not. *Fuller* v. *Andrew*, 139.

Finding for the plaintiff, in an action for personal injuries received by an employee of a wrecking crew and alleged to have been caused by negligence of an employee of the owner of certain upright boilers being torn down, could not be said as a matter of law to be based upon conjecture, but was warranted by reasonable inferences from facts which might have been found to exist. *Heuser* v. *Tileston & Hollingsworth Co.* 299.

Upon the evidence at the trial of an action against a street railway corporation by an experienced lineman for personal injuries sustained in the year 1907 when in the defendant's employ, by falling from a pole by reason of coming in contact with the defendant's telephone wires charged with a dangerous current of electricity passed to them from high tension wires maintained by the defendant on another cross arm, it was held that there was no evidence of negligence for which the defendant was liable, it being equally probable that the defendant was not at fault or that the dangerous condition was caused by a fellow servant of the plaintiff for whose negligence the defendant was not legally accountable to the plaintiff. *Murphy* v. *Old Colony Street Railway*, 333.

Inferences.

Evidence at the trial of an action against the owner of a motor vehicle for personal injuries caused by negligence of the chauffeur driving the car in the defendant's absence was held not to warrant a finding that a failure of the plaintiff to find the chauffeur to summon him in order that he might testify as a witness relating to the scope of his employment was due to any act on the part of the defendant. *Gardner* v. *Farnum*, 193.

Record upon a report by a judge presiding at the trial of an action of contract by a railroad corporation for certain freight and other charges was held to show that the case was tried upon a statement of agreed facts submitted as evidence, which with "the original freight bills" was the basis from which the ultimate decisive facts so far as necessary must be determined. *New York Central & Hudson River Railroad* v. *York & Whitney Co.* 206.

In the case described above it also was held that, where more than one rational inference could be drawn from the evidence as stated, a question of fact for the jury was presented, and the only question of law in regard to such an inference was whether the jury's finding of fact was warranted. *Ibid.*

Upon the evidence at the trial of an action by an employee of a wrecking company against the owner of a mill for personal injuries it was held that findings were warranted, either that a chisel left upon a plank between two upright boilers fell with the plank and struck the plaintiff, or that the work-

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man of the owner as he ascended the ladder dropped a chisel upon the plaintiff; that, whichever was the cause determined upon by the jury, a further finding was warranted that the plaintiff's injuries were due to negligence for which the defendant might be found to be responsible. *Heuser* v. *Tileston & Hollingsworth Co.* 299.

A finding of the jury for the plaintiff at the trial of the action above described could not be said as a matter of law to be based upon conjecture, but was warranted by reasonable inferences from facts which might have been found to exist. *Ibid.*

The inference of due care on the part of the plaintiff or decedent in the actions described in St. 1914, c. 553, which by the statute is made a presumption of fact, is not arbitrary nor irrational. *Duggan* v. *Bay State Street Railway*, 370.

On the evidence at the trial of four actions of tort against a street railway corporation for personal injuries sustained after the enactment of St. 1914, c. 553, by being run into by an electric street railway car of the defendant when the plaintiffs were travelling in a motor butcher cart driven by one of them, it was held that the only reasonable conclusion was that the negligent conduct of each of the plaintiffs helped to bring on the accident, so that a verdict rightly was ordered for the defendant in each of the cases. *Pigeon* v. *Massachusetts Northeastern Street Railway*, 392.

Best and Secondary.

In this Commonwealth quotations of prices and market reports, compiled from statistics received from large dealers as to actual transactions in the open market published in a standard trade journal recognized by dealers as a reliable source of information, are not admissible as evidence of the value of the commodities whose prices are quoted therein when better evidence is obtainable and the parties who furnished the evidence to the trade journal can be called as witnesses. *Doherty* v. *Harris*, 341.

Competency.

At the trial of an indictment for manslaughter against a man, a witness, who is not an electric or telephone expert, may be permitted to describe the parts, produced in court and identified by him, of a dictograph apparatus installed by him in cells where the defendant and his wife were confined and to describe the way in which the apparatus was arranged and was connected in another room with a receiver used by a person to overhear conversations between the defendant and his wife. *Commonwealth* v. *Wakelin*, 567.

A witness who, by means of such dictograph, overheard conversations between the defendant and his wife which were upon matters material to the issues on trial, and who testifies that he recognized their respective voices, may be permitted to state what he heard, the question, what weight should be given to the testimony, being for the jury. *Ibid.*

The circumstance, that the conversations so overheard were between husband and wife when physically alone, is no ground for objection to the admissibility of the evidence, R. L. c. 175, § 20, cl. 1, not being applicable and there being no rule of law that a third person who overhears a conversation

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between a husband and his wife, intended to be private, may not testify what it was. *Commonwealth* v. *Wakelin*, 567.

Relevancy and Materiality.

At the trial of an action of tort against a physician for injuries alleged to have resulted from negligence of the defendant in treatment of the plaintiff shortly after birth, evidence was not admissible as to the circumstances and environments in the plaintiff's home, nor as to whether treatment in a hospital then would have been proper or more efficient and desirable. *Medlin* v. *Bloom*, 201.

Where, at the trial of an action for personal injuries and death caused by the plaintiff's intestate being run into by a street car of the defendant after he had left a car going in the opposite direction on an adjoining track, there was evidence that when the accident occurred the car from which the plaintiff's intestate had alighted had started again and there was no evidence that that car was stationary at the time it was passed by the car that struck the intestate, it was held to have been proper for the judge to exclude evidence of a rule of the defendant governing the conduct of motormen "passing standing cars." *Mercier* v. *Union Street Railway*, 397.

At the trial of an indictment for manslaughter against a man, a witness, who is not an electric or telephone expert, may be permitted to describe the parts, produced in court and identified by him, of a dictograph apparatus installed by him in cells where the defendant and his wife were confined and to describe the way in which the apparatus was arranged and was connected in another room with a receiver used by a person to overhear conversations between the defendant and his wife. *Commonwealth* v. *Wakelin*, 567.

Where the district attorney at the trial of an indictment for manslaughter fails to require the exclusion, as incompetent, of evidence tending to show that a third person out of court had confessed to the commission of the crime with which the defendant was charged, he is not thereby precluded from objecting to the introduction of further evidence of statements by the same third person tending to substantiate his alleged confession. *Ibid.*

The Commonwealth, having failed at the trial of an indictment for manslaughter to require the exclusion as incompetent of evidence of a confession by a third person of the commission of the crime with which the defendant was charged, and such testimony being admitted, may be permitted against the objection of the defendant to introduce testimony tending to show that at the time of the commission of the crime such third person was in a distant part of the Commonwealth. *Ibid.*

Remoteness.

Testimony, at the trial of an action by an employee of a wrecking company against the owner of certain boilers being wrecked, for personal injuries due to the falling upon the plaintiff of a chisel, that a day or two before the accident a workman of the defendant was seen to come up half way through the manhole in the top of the boiler, pick up something and go back again, was admissible as having some tendency to show that something was on a plank between two boilers and, in connection with other testimony of the

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same witness that he had seen tools on the plank, such testimony warranted an inference that the plank was used by workmen of the defendant to place tools upon. *Heuser* v. *Tileston & Hollingsworth Co.* 299.

Self-serving Statement.

An exception to a refusal of a master to whom was referred a suit in equity to admit in rebuttal testimony of a witness to the effect that the plaintiff previous to the bringing of the suit made statements to the witness consistent with those as to which he testified at the hearing must be overruled, as the exclusion of the testimony was proper. *Ananian* v. *Melkon*, 322.

Hearsay.

In this Commonwealth quotations of prices and market reports, compiled from statistics received from large dealers as to actual transactions in the open market published in a standard trade journal recognized by dealers as a reliable source of information, are not admissible as evidence of the value of the commodities whose prices are quoted therein when better evidence is obtainable and the parties who furnished the evidence to the trade journal can be called as witnesses. *Doherty* v. *Harris*, 341.

Opinion: Experts.

A medical or other expert cannot be allowed to be asked to give his opinion founded on "the evidence in the case," unless such evidence is admittedly capable of only one interpretation, which here was not the case. *Connor* v. *O'Donnell*, 39.

Question of an expert at the trial of an action against a street railway company for personal injuries alleged to have resulted from the plaintiff being thrown from a street car of the defendant by reason of his hold being broken as the car moved rapidly over a poor track, predicated upon a statement of all the facts relating to the accident which the plaintiff contended the evidence showed, and concluding, "What would you say was the cause of the accident?" should have been excluded. *Duggan* v. *Bay State Street Railway*, 370.

An exception to the admission of the testimony above described was overruled as not having injuriously affected the substantial rights of the defendant, since it appeared that the testimony was merely cumulative upon other evidence. *Ibid.*

At the trial of an action by an employee against his employer for personal injuries received when the plaintiff with others was moving a heater, a man of experience in handling heaters, called by the plaintiff as a witness, testified as an expert, subject to the defendant's exception, that the method adopted in moving the heater was improper, and that a proper method would have been to remove the legs first and then by means of rollers and skids to slide or roll the heater along the floor, and it was held that the subject was a proper one for expert testimony and that the evidence was competent. *Winston* v. *Converse Rubber Shoe Co.* 449.

At the trial of an indictment for manslaughter against a man, a witness, who is not an electric or telephone expert, may be permitted to describe the parts, produced in court and identified by him, of a dictograph appa-

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ratus installed by him in cells where the defendant and his wife were confined and to describe the way in which the apparatus was arranged and was connected in another room with a receiver used by a person to overhear conversations between the defendant and his wife. *Commonwealth* v. *Wakelin*, 567.

Declarations of Deceased Persons.

Whether R. L. c. 175, § 66, relative to the admission in evidence of a declaration of a deceased person, is applicable at the trial of an indictment for manslaughter, was not decided, evidence which was excluded partly on that ground having also been excluded rightly because the presiding judge found that the statements offered were not made in good faith. *Commonwealth* v. *Wakelin*, 567.

Absence of Witness.

Evidence at the trial of an action against the owner of a motor vehicle for personal injuries caused by negligence of the chauffeur driving the car in the defendant's absence was held not to warrant a finding that a failure of the plaintiff to find the chauffeur to summon him in order that he might testify as a witness relating to the scope of his employment was due to any act on the part of the defendant. *Gardner* v. *Farnum*, 193.

Market Reports.

In this Commonwealth quotations of prices and market reports, compiled from statistics received from large dealers as to actual transactions in the open market published in a standard trade journal recognized by dealers as a reliable source of information, are not admissible as evidence of the value of the commodities whose prices are quoted therein when better evidence is obtainable and the parties who furnished the evidence to the trade journal can be called as witnesses. *Doherty* v. *Harris*, 341.

Admitted without Objection.

It was held that certain evidence admitted unqualifiedly and without any objection or exception at the hearing of a petition for the registration of the title to certain land where the existence of a way by necessity is an issue, as to the expressed intention of a former owner of the locus when conveying it to another, that the grantee would use, to reach a public way otherwise inaccessible excepting over the remaining land of the grantor, a way across land then owned by the grantee's wife, must be given proper probative force and that its admissibility could not be considered by this court. *Orpin* v. *Morrison*, 529.

Where, at the close of all the evidence at the hearing of the petition above described, the judge ruled that the evidence described was competent and an exception was taken, such ruling and exception do not bring to this court the question of the admissibility or competency of the evidence. *Ibid.*

If evidence, which is incompetent by reason of a rule of law, but is material to the issue on trial, is admitted without objection, it is entitled to its probative force and therefore can be contradicted. *Commonwealth* vi *Wakelin*, 567.

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Procured by Dictograph.

At the trial of an indictment for manslaughter against a man, a witness, who is not an electric or telephone expert, may be permitted to describe the parts, produced in court and identified by him, of a dictograph apparatus installed by him in cells where the defendant and his wife were confined and to describe the way in which the apparatus was arranged and was connected in another room with a receiver used by a person to overhear conversations between the defendant and his wife. *Commonwealth* v. *Wakelin*, 567.

A witness who, by means of such dictograph, overheard conversations between the defendant and his wife which were upon matters material to the issues on trial, and who testifies that he recognized their respective voices, may be permitted to state what he heard, the question, what weight should be given to the testimony, being for the jury. *Ibid.*

The circumstances, that the conversations so overheard were between husband and wife when physically alone, is no ground for objection to the admissibility of the evidence, R. L. c. 175, § 20, cl. 1, not being applicable and there being no rule of law that a third person who overhears a conversation between a husband and his wife, intended to be private, may not testify what it was. *Ibid.*

Violation of Rule as Evidence of Negligence.

Where, at the trial of an action for personal injuries and death caused by the plaintiff's intestate being run into by a street car of the defendant after he had left a car going in the opposite direction on an adjoining track, there was evidence that when the accident occurred the car from which the plaintiff's intestate had alighted had started again and there was no evidence that that car was stationary at the time it was passed by the car that struck the intestate, it was held to have been proper for the judge to exclude evidence of a rule of the defendant governing the conduct of motormen "passing standing cars." *Mercier* v. *Union Street Railway*, 397.

Violation of Statute as Evidence of Negligence.

Maintenance of a public nuisance in tide water in violation of a penal statute as evidence of negligence causing death. *Fuller* v. *Andrew*, 139.

Evidence, which, it was held, tended to show a violation by a physician of R. L. c. 75, § 50, as amended by St. 1905, c. 251, § 2, requiring a notice from the physician under circumstances described in the statutes "immediately," and which therefore was evidence of his negligence, the evident purpose of the statutory requirement being to make it possible for immediate and scientific treatment to be given and blindness to be prevented. *Medlin* v. *Bloom*, 201.

Violation of St. 1911, c. 244, § 1, as evidence of negligence causing the burning of certain buildings. *Todd* v. *Traders & Mechanics Ins. Co.* 595.

Of Agency.

Evidence at the trial of an action for personal injuries resulting from an accident caused by negligence of the driver of a motor vehicle, which tends

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merely to show that the defendant, who was not in the vehicle at the time of the accident, owned the vehicle and that the driver was in his general employ, is not sufficient to warrant a finding that at the time of the accident the driver was acting within the scope of his employment. *Gardner* v. *Farnum*, 193.

Further evidence which, it was held, did not warrant an inference that the chauffeur was upon an errand for the defendant nor that he was acting within the scope of his employment at the time of the accident. *Ibid.*

Of Conscious Suffering.

The evidence at the trial of an action for causing the conscious suffering and death of one, who, when in a motor boat in tidal waters, was struck by a portion of a pier which fell upon him, was held not to warrant a finding of conscious suffering, it being wholly a matter of surmise and conjecture whether there was such suffering or not. *Fuller* v. *Andrew*, 139.

Of Custom.

Evidence at the trial of an action for breach of a contract, made by correspondence, whereby the plaintiff agreed to sell and deliver and the defendant agreed to purchase and pay for certain marble to be used for the interior finish of a post office building, which was offered to show a general custom that such contracts relating to the construction of government buildings always were subject to a condition that samples should be approved by a supervising architect employed by the national government, was held properly to have been excluded, there being no offer to show that the plaintiff had knowledge of the custom and the evidence not tending to show a custom of such general and universal application that the plaintiff must be presumed to have had knowledge of it. *Puffer Manuf. Co.* v. *Yeager*, 557.

Of Value.

In this Commonwealth quotations of prices and market reports, compiled from statistics received from large dealers as to actual transactions in the open market published in a standard trade journal recognized by dealers as a reliable source of information, are not admissible as evidence of the value of the commodities whose prices are quoted therein when better evidence is obtainable and the parties who furnished the evidence to the trade journal can be called as witnesses. *Doherty* v. *Harris*, 341.

Ruling of a master to whom a suit in equity for an accounting was referred to ascertain the value of the stock of a certain corporation at a certain date, admitting and considering evidence showing the earnings of that corporation for the three years succeeding the date in question, was said not to have harmed a party who objected to it. *Arnold* v. *Maxwell*, 441.

To Rebut Incompetent but Material Evidence admitted without Objection.

Where the district attorney at the trial of an indictment for manslaughter fails to require the exclusion, as incompetent, of evidence tending to show that a third person out of court had confessed to the commission of the

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crime with which the defendant was charged, he is not thereby precluded from objecting to the introduction of further evidence of statements by the same third person tending to substantiate his alleged confession. *Commonwealth* v. *Wakelin*, 567.

The Commonwealth, having failed at the trial of an indictment for manslaughter to require the exclusion as incompetent of evidence of a confession by a third person of the commission of the crime with which the defendant was charged, and such testimony being admitted, may be permitted against the objection of the defendant to introduce testimony tending to show that at the time of the commission of the crime such third person was in a distant part of the Commonwealth. *Ibid.*

EXCEPTIONS.

In actions at law, see appropriate subtitle under PRACTICE, CIVIL.

To master's report in suit in equity, see appropriate subtitle under EQUITY PLEADING AND PRACTICE.

EXECUTOR AND ADMINISTRATOR.

When a person is injured by ice falling upon him due to a defective condition of a building and dies within six days without notice thereof having been given in accordance with Sts. 1908, c. 305; 1913, c. 324, in his behalf to the person responsible for the condition of the premises resulting in the injury, a notice given five days after the death of the person so injured by an attorney at law acting on behalf of one who more than a month later was appointed administrator of the estate of the person so injured does not satisfy the requirements of the statute, even if the attorney's act is ratified by the administrator after his appointment. *O'Neil* v. *Squire*, 294.

It here was assumed for the purposes of decision, that an administrator *de bonis non* with the will annexed was the proper party to sue for damages suffered by the negligent withholding of the will. *Sawyer* v. *Old Lowell National Bank*, 342.

FALSE REPRESENTATIONS.

See DECEIT.

FIRE.

Where, in an action upon a policy of fire insurance, it appeared that the buildings insured were destroyed by a fire which was communicated from a fire set more than fifty feet from the buildings by the insured, who had violated the provisions of St. 1911, c. 244, § 1, in failing to procure the permit required by that statute before starting the fire, it was held that it would have been improper to order a verdict for the defendant, there having been questions for the jury, whether the violation of the statute in failing to procure the permit was a negligent act of the insured which was approximate cause of the loss, and, if so, whether the negligence was of such a character as to bar recovery on the policy. *Todd* v. *Traders & Mechanics Ins. Co.* 595.

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FRAUD.

Upon the evidence at the trial of an action of tort by a real estate broker against a real estate dealer and another real estate broker, charging the defendants with having conspired to procure through fraud the payment to the defendant broker of a commission on the purchase of a house by the defendant real estate dealer that really had been earned by the plaintiff but had been relinquished by him induced by the fraud of the defendants, it was held that a finding of such a joint tort committed by the defendants was warranted. *Henry W. Savage, Inc.* v. *Wheelock*, 111.

It is fraud for one in negotiations leading to the making of a contract to state a fact as true of his own knowledge when he has no such knowledge. *Bates* v. *Cashman*, 167.

A person seasonably may rescind a contract which he has been induced to enter into in reliance upon false, though innocent, misrepresentations respecting a cognizable material fact made as of his own knowledge by the other party to the contract. *Ibid.*

A suit for the specific performance of a contract to purchase capital stock and bonds of a corporation cannot be maintained where it appears that the defendant was induced to make the contract by false, though innocent, misrepresentations respecting a cognizable material fact made as of his own knowledge by the plaintiff. *Ibid.*

Where a bank has had no actual or constructive notice of fraud or misdoing on the part of a treasurer, who is one of its depositors, if the bank acting in good faith merely credits deposits of checks, which it knows to have been drawn by the treasurer upon the funds of the principal, to the personal account of the treasurer, this does not make it liable to the principal if the treasurer afterwards misappropriates the deposit. *Kendall* v. *Fidelity Trust Co.* 238.

In a suit in equity by the trustees of a land trust against a trust company, seeking to impress with a trust funds deposited with the defendant by the plaintiffs' assistant treasurer, a dishonest agent, it was held under the circumstances that, as the defendant had no interest in the deposits and never had received any part of them for the payment of any debt to it, the defendant could not be charged with constructive notice of the fraudulent conduct of the depositor, and accordingly that there was no evidence that the defendant knew that the depositor intended to misappropriate the funds, and that the plaintiff was entitled to no relief against it. *Ibid.*

A finding of a judge who heard a suit in equity against a corporation for five years' salary as "supervisor" alleged to be due to the plaintiff in accordance with a vote of the directors of the defendant, was interpreted, upon an appeal from a final decree dismissing the bill, to be a finding to the effect that the vote of the directors was passed with an agreement between them and the plaintiff that it should not be binding upon the defendant; and it therefore was held that the suit must be dismissed. *McCormick* v. *Commercial Brewing Co.* 289.

A suit in equity to have a second mortgage of real estate declared invalid because procured by fraud, to have a sale in foreclosure declared invalid because the plaintiff, the mortgagor, was not notified and the sale was carried out by a fraudulent conspiracy in which the purchaser shared, and

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to permit the plaintiff to redeem, properly was dismissed where it appeared from findings of a master confirmed by the trial judge that the facts were not as alleged in the bill. *Ananian* v. *Melkon*, 322.

At the trial of issues framed in a suit in equity brought by an insurance company against one, insured by it against liability arising from accidents in which his motor vehicle was involved, and an attorney at law alleged to have been in collusion with the insured to defraud the plaintiff, to enjoin the insured from maintaining an action of contract upon the policy, instructions contained in the charge to the jury to the effect that the attorney had a legal right to represent the insured in matters unrelated to the action against him by the person who was injured in the collision with the motor vehicle and to represent the injured person in that action were held to contain no error. *Maryland Casualty Co.* v. *Jackson*, 384.

It also was held that the instructions above quoted did not preclude the jury from considering the propriety of the attorney's appearance in the case or any inference of collusion therefrom. *Ibid.*

Where a husband made certain transfers to himself as executor of his mother's will amounting to $50,000 for the purpose of preventing his wife from receiving any part of this property and the executor of the testator's will paid to his widow as one third of the property standing in his name at the time of his death the sum of $825.69, it was said, that, if the question of fraud were open, there was nothing to show that the husband practised any legal fraud upon his wife. *Redman* v. *Churchill*, 415.

Allegations in a declaration on a building contract which were held not to allege fraud of the engineer. *Marsch* v. *Southern New England Railroad*, 483.

In a bill in equity by a mother against the executrix of the will of a son to whom during his life she had conveyed certain real estate, to have the conveyance set aside, it was held that the relationship of parent and child did not preclude business relations between them. *Parsons* v. *Parsons*, 544.

Statement of the rule for determining the validity of such transactions. *Ibid.*

Upon application of the rule, it was held that the conveyance was for a good consideration and was valid. *Ibid.*

FRAUDS, STATUTE OF.

Where, in consideration of the forbearance of the holder of a note made by a certain corporation to bring a suit against the corporation and an individual person to reach and apply in satisfaction of the holder's claim property of the corporation in the hands of the individual person, that person promises to liquidate the note in monthly payments of $100 each, this is a promise to answer for the debt of another within the meaning of R. L. c. 74, § 1, cl. 2. *George Lawley & Son Corp.* v. *Buff*, 21.

In an action on a promise to pay a note of a certain corporation held by the plaintiff, in which the defendant pleaded and relied on the statute of frauds, correspondence, including a letter signed by the defendant and containing an unambiguous recognition of the alleged contract, was held to be a sufficient memorandum to satisfy the statute although the letter also contained an express repudiation of the contract. *Ibid.*

An oral contract between a solicitor of insurance and a life insurance company

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or its general agent, which is to continue in force during the continuation of the general agency or until it is terminated by reason of one of several specified acts on the part of the solicitor, and which provides for the payment to the solicitor as compensation of a certain percentage of first year's premiums and another percentage of all renewal premiums upon policies procured by him from the company, is not within the provisions of the statute of frauds, R. L. c. 74, § 1, cl. 5. *Elwell* v. *State Mutual Life Assurance Co.* 248.

The provisions of R. L. c. 74, § 6, prevent the maintenance of an action of contract by an attorney at law against the executor of a will to enforce an oral agreement by the defendant's testator to bequeath to the plaintiff a certain sum of money in payment for services at that time already rendered and to be rendered to the testator by the plaintiff as an attorney at law. *Runyan* v. *Van Iderstine*, 428.

GIFT.

It was said that a husband has a right to give away his personal property during his lifetime without his wife's consent. *Redman* v. *Churchill*, 415.

It also was said that a gift made by a husband to himself as the executor of his mother's will of the greater part of his personal property for the purpose of preventing his wife from acquiring any portion of the property so given by him is valid. *Ibid.*

GRADE CROSSING.

Action for personal injuries received on a grade crossing of a railroad with a highway. *McGlauflin* v. *Boston & Maine Railroad*, 431.

GREAT WAR.

In interpreting a correspondence between a manufacturing corporation in this country through its agent in Norway and a firm of merchants in Sweden, which took place a few weeks after the outbreak of the great war, it was said that in general the court will take judicial notice of the disturbance of commercial relations between neutral countries dependent upon navigation in the zone affected by that war. *Kehlor Flour Mills Co.* v. *Linden*, 119.

HAVERHILL.

Under R. L. c. 75, § 113, as amended by St. 1907, c. 467, § 1, a rule of the State board of health, that "No person shall . . . , unless permitted by a written permit of the board of water commissioners of the city of Haverhill, fish in . . . Crystal Lake . . . , so called, in the city of Haverhill . . . , said lakes . . . being used by said city as sources of water supply," is valid and enforceable. *Commonwealth* v. *Hyde*, 6.

HEALTH, BOARD OF.

See BOARD OF HEALTH.

HIGHWAY.

See WAY, *Public.*

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HOMICIDE.

Determination of various questions as to pleading and practice and proof, which arose at a trial of an indictment for murder, where the district attorney entered a *nolle prosequi* as to so much of the indictment as charged a crime greater than manslaughter, and where a dictograph was used for proving admissions by the defendant. *Commonwealth* v. *Wakelin*, 567.

HUSBAND AND WIFE.

A woman to whom an award is made under the workmen's compensation act as the dependent widow of a deceased employee is entitled to receive the payments during the whole of the period covered by the award if she lives so long, and her right to compensation does not cease by reason of her marriage before the expiration of the period to another man able and willing to support her. *Bott's Case*, 152.

A wife, whose real estate, purchased by her with her own money, owned by her and standing of record in her own name, has been specially attached on mesne process in an action at law against her husband only, is "a person whose property has been attached" and as such is entitled to relief by dissolution of the attachment under R. L. c. 167, § 110, as amended by St. 1909, c. 190. *Shea* v. *Peters*, 197.

A bill in equity by a husband against his wife, alleging that the plaintiff caused certain parcels of real estate which he had paid for to be conveyed to the defendant, who "expressly agreed and declared that she held the title to said real estate for the benefit of the plaintiff," sets forth no valid trust, the alleged declaration of the defendant not being alleged to be in writing as required by R. L. c. 147, § 1. *Keown* v. *Keown*, 313.

A devise and bequest of a testator to his wife of one third part of the real and personal property "belonging to me and standing in my name, but no part of the real or personal property held by me as executor or trustee of the estate of my mother" entitles the widow to no right to share in certificates of stock and mortgages which the testator before his death transferred and assigned to himself as the executor of his mother's will. *Redman* v. *Churchill*, 415.

In the case in which the point above stated was decided, it appeared that the property which the testator assigned and transferred to himself as the executor of his mother's will amounted in value to at least $50,000, that the assignments and transfers were made for the purpose of preventing his wife from receiving any part of this property and that the executor of the testator's will paid to his widow as one third of the property standing in his name at the time of his death the sum of $825.69, and it was said, that, if the question of fraud were open, there was nothing to show that the husband practised any legal fraud upon his wife. *Ibid.*

It was said that a husband has a right to give away his personal property during his lifetime without his wife's consent. *Ibid.*

It also was said that a gift made by a husband to himself as the executor of his mother's will of the greater part of his personal property for the purpose of preventing his wife from acquiring any portion of the property so given by him is valid. *Ibid.*

Under St. 1908, c. 305, as amended by St. 1913, c. 324, a husband, who has

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incurred expenses by reason of personal injuries sustained by his wife resulting from snow or ice, is required to give the statutory notice in order to maintain an action for his loss thus sustained. *Erickson* v. *Buckley*, 467.

A notice given by a wife under St. 1908, c. 305, as amended by St. 1913, c. 324, of personal injuries sustained by her resulting from snow or ice, which is confined by its terms to her claim for damages and was "given at her request and in her behalf. By her attorneys, . . ." is not a notice in behalf of her husband as the foundation of a claim by him for consequential damages arising from her injuries. *Ibid.*

The circumstance, that a conversation overheard by a dictograph was between husband and wife when physically alone, is no ground for objection to the admissibility of the evidence at a criminal trial, R. L. c. 175, § 20, cl. 1, not being applicable and there being no rule of law that a third person who overhears a conversation between a husband and his wife, intended to be private, may not testify what it was. *Commonwealth* v. *Wakelin*, 567.

ICE.

See SNOW AND ICE.

IMPOUNDED PROPERTY.

Property impounded by order of a police court for the purposes of the prosecution of a complaint "until further order of said court" cannot be reached by trustee process until the impounding has been brought to an end by a further order of the court. *Wallace* v. *Coyne*, 475.

In order to reach such impounded property by an attachment on trustee process it is not enough to show that the proceedings in which the property was impounded have been disposed of and that the time has come to bring the impounding order to an end. *Ibid.*

It is necessary to show that the further order of the police court has been made which alone can terminate the impounding. *Ibid.*

The fact, that the district attorney who had charge of the prosecution in which the property was impounded was willing that the impounding should be ended, does not show that it has been ended. *Ibid.*

Whether property impounded by such an order of court is held by its custodian as a public officer who is accountable for it merely as such officer within R. L. c. 189, § 31, cl. 3, it here was not necessary to consider. *Ibid.*

INCOME.

Tax on incomes, see appropriate subtitle under TAX.

INDUSTRIAL ACCIDENT BOARD.

See WORKMEN'S COMPENSATION ACT.

INFANT.

An infant is not liable in tort for deceit by reason of having made false representations that he was of age. *Knudson* v. *General Motorcycle Sales Co. Inc.* 54.

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An infant is not estopped to deny a recital "that he is at least twenty-one years of age" contained in a contract in writing signed by him that he seeks to avoid. *Knudson* v. *General Motorcycle Sales Co. Inc.* 54.

An infant who avoids a purchase made by him under a contract of conditional sale and returns the article purchased is not liable in damages for deterioration of the article while in his possession under the contract. *Ibid.*

INSPECTOR OF BUILDINGS.

Under R. L. c. 104, §§ 22, 55, relating to the filing of a copy of the plans for the erection of a school house with the inspector of factories and public buildings for the district in which it is to be erected, a contractor engaged in the erection of a school house is not required to file a copy of the plans, and his failure to do so does not deprive him of any rights under the contract. *Ordway* v. *Newburyport*, 306.

The issuing of a certificate of the inspector of factories and public buildings indorsed with the approval of the chief of the district police, which is mentioned in § 22, is not a condition precedent to recovery from the city by one who has supplied materials and labor for heating and ventilating the school house in accordance with his contract to do so. *Ibid.*

In such an action on a contract for heating and ventilating the school house building the fact, that the plaintiff knew that the inspector had disapproved the plans submitted for heating the building, does not deprive him of his right to recover, if he has performed fully the work required by the plans and the specifications in his contract and if the disapproval of the inspector related wholly to a defect in the work done by the general contractor for the building of the school house. *Ibid.*

INSURANCE.

Fire.

Where, in an action upon a policy of fire insurance, it appeared that the buildings insured were destroyed by a fire which was communicated from a fire set more than fifty feet from the buildings by the insured, who had violated the provisions of St. 1911, c. 244, § 1, in failing to procure the permit required by that statute before starting the fire, it was held that it would have been improper to order a verdict for the defendant, there having been questions for the jury, whether the violation of the statute in failing to procure the permit was a negligent act of the insured which was a proximate cause of the loss, and, if so, whether the negligence was of such a character as to bar recovery on the policy. *Todd* v. *Traders & Mechanics Ins. Co.* 595.

Mere negligence on the part of one insured against loss by fire does not prevent recovery on the policy, it being one of the objects of insurance to protect the insured from loss due to carelessness. *Ibid.*

Against Liability.

In a suit in equity under St. 1914, c. 464, by one who had recovered judgment against certain bridge builders for bodily injuries, to reach casualty

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insurance in a certain insurance company and apply it to the satisfaction of such judgment, it was held that a requirement of the insurance policy as to notice by the insured to the company had not been complied with by the insured, who had assumed from the fact that the plaintiff had gone back to his work and had made no complaint that his injury was a trifling one, the policy having required immediate notice of the occurrence of an accident, regardless of any claim for damages or the amount of damages sustained, and such requirement being a reasonable one; and therefore the suit was dismissed. *McCarthy* v. *Rendle*, 35.

In the case above described it was pointed out that the fact, that the person injured had a reasonable and *bona fide* doubt as to the existence of any injury or any liability, could not deprive the insurer of its contractual right under the policy to have immediate notice of the occurrence of an accident regardless of any claim that might be founded on it. *Ibid.*

At the trial of issues framed in a suit in equity brought by an insurance company against one, insured by it against liability arising from accidents in which his motor vehicle was involved, and an attorney at law alleged to have been in collusion with the insured to defraud the plaintiff, to enjoin the insured from maintaining an action of contract upon the policy, instructions contained in the charge to the jury to the effect that the attorney had a legal right to represent the insured in matters unrelated to the action against him by the person who was injured in the collision with the motor vehicle and to represent the injured person in that action were held to contain no error. *Maryland Casualty Co.* v. *Jackson*, 384.

It also was held that the instructions above quoted did not preclude the jury from considering the propriety of the attorney's appearance in the case or any inference of collusion therefrom. *Ibid.*

Workmen's Compensation.

In a claim for compensation under the workmen's compensation act by one who was the president and a director and the owner of one half of the capital stock of a corporation, which was the employer, it was held that, under the circumstances and upon the representations leading up to and the provisions of the policy insuring the corporation, a decree of the Superior Court confirming an award by the Industrial Accident Board for the claimant, based on a ruling that "the fact that the insurer, for any reason, did not include the earnings of the claimant in its payroll audit, has no bearing upon the rights of the claimant as an employee," must be reversed and a decree entered in favor of the insurer, because, assuming that the claimant was an employee of the corporation of which he was the president, his injury was not covered by the policy because his remuneration was not included in the payroll on which the premium was based. *Cashman's Case*, 600.

Of Motor Vehicle.

If an insurance company issues a policy against fire and theft upon a motor car to a person who does not own the car and has no insurable interest in it and afterwards through an agent agrees orally to substitute in the policy the name of the owner of the car in place of the name of the person to whom it was issued, this gives the owner, in case of loss by theft and fire,

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no right to bring an action on the policy. *O'Neill* v. *Queen Ins. Co. of America*, 269.

Oral.

If an insurance company issues a policy against fire and theft upon a motor car to a person who does not own the car and has no insurable interest in it and afterwards through an agent agrees orally to substitute in the policy the name of the owner of the car in place of the name of the person to whom it was issued, this gives the owner, in case of loss by theft and fire, no right to bring an action on the policy. *O'Neill* v. *Queen Ins. Co. of America*, 269.

Solicitor and Agent.

An insurance solicitor, who had made a contract in writing with a firm composed of two partners, who were the general agents of a life insurance company, regarding compensation, which provided that the contract should be terminated as between the parties only in certain specific instances, upon dissolution of the partnership agreed orally with the remaining partner, who then made a new contract of general agency with the company, that the provisions of the contract formerly made with him by the firm should continue in force, and it was held that the new oral contract was supported by a good consideration and was not terminable at the will of the general agent, but could be terminated only in accordance with the provisions of the former contract in writing which is adopted. *Elwell* v. *State Mutual Life Assurance Co.* 248.

A provision of such contract, which provided for its termination if the solicitor left the agency of the company to engage in other business or became connected with another life insurance company or severed his connections with the agency, was held to mean that such termination should occur upon a voluntary retirement by the solicitor, and not to mean that it would occur upon his discharge for a cause not included in the contract's provisions or upon his enforced resignation. *Ibid.*

Where such a contract, made by the company's general agent, was a contract for services to be rendered by the solicitor, the compensation for which was to be paid by the company, the company was held to have no power to terminate it in the absence of a provision in the contract for such termination by the company. *Ibid.*

The mere fact, that an insurance solicitor advocated and sought legislation providing for a different form of endowment policy than that issued by a company by whose general agents he was employed, does not show disloyalty on his part warranting his discharge, where it appears that he honestly believed that the form of policy which he advocated, if adopted, would enure to the advantage not only of the insured but also of the company, and that his activities in this regard were known to the company. *Ibid.*

Where, at the trial of an action by an insurance solicitor against an insurance company upon a contract of employment entered into between the plaintiff and general agents of the defendant, it appeared that the company and the general agent both regarded the contract as binding upon the company, that its officers knew of the contract, that it paid the solicitor his commis-

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sions thereunder and that the company was the actor in discharging the solicitor and fixing the terms of his dismissal, findings of the judge were held to have been warranted that the company was liable upon the contract. *Elwell* v. *State Mutual Life Assurance Co.* 248.

In an action upon the same contract against the general agent it was held that the general agent likewise was liable personally to the solicitor, although the solicitor could have but one satisfaction in damages. *Ibid.*

An oral contract between a solicitor of insurance and a life insurance company or its general agent, which is to continue in force during the continuation of the general agency or until it is terminated by reason of one of several specified acts on the part of the solicitor, and which provides for the payment to the solicitor as compensation of a certain percentage of first year's premiums and another percentage of all renewal premiums upon policies procured by him from the company, is not within the provisions of the statute of frauds, R. L. c. 74, § 1, cl. 5. *Ibid.*

It was pointed out that, in assuming for the purposes of a decision that a statement of a clerk of an insurance company "that he would attend to" a change in the policy amounted to an agreement to make the change and also that the agents were authorized to make such a change, neither of these points was decided. *O'Neill* v. *Queen Ins. Co. of America*, 269.

Mutual Company.

By reason of the provisions of a certain policy of life insurance issued by a mutual life insurance company incorporated in the State of New York and because the policy must be construed according to the laws of the State of New York, it was held that the courts of this Commonwealth would not take jurisdiction of a suit in equity by a citizen of the Commonwealth against the company to determine the amount which should be paid by the plaintiff as premiums, to restrain the defendant from declaring the policy forfeited and to compel it to accept a certain amount as full payment of premiums instead of a larger amount fixed by a vote of the directors of the corporation. *Richards* v. *Security Mutual Life Ins. Co.* 320.

INTEREST.

Although the general rule in equity as at law is to allow only simple interest by way of damages, yet compound interest sometimes is allowed, and in the present case, where the defendant had been ordered to account for the value of certain stock at a certain date and the case was referred to a master to ascertain the value of the stock at that date, it was held that a ruling of the master was not erroneous, that interest should be computed "from the date of settlement to the date of the filing of the bill, with a rest as of the date of filing the bill and interest thereafter on the principal so ascertained" to the date of the decree. *Arnold* v. *Maxwell*, 441.

In the case above described a decision of this court at a previous stage of the same case had ordered that, in the accounting, interest should be allowed on the whole amount due to the plaintiff "from the date of settlement to the date of filing the bill," and it was pointed out that this was the law of the case. *Ibid.*

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INTERSTATE COMMERCE.

The provisions of the interstate commerce law as to rates are applicable only to those who expressly or by implication are or become parties to the contract of transportation. Whether one is or has become a party to that contract must be determined by the general principles of the common law. By RUGG, C. J. *New York Central & Hudson River Railroad* v. *York & Whitney Co.* 206.

Where under a "straight" bill of lading in the form established by the interstate commerce commission retained by the shipper, a consignee, who is not a party to the bill of lading and does not know its terms, notifies the carrier upon the arrival of the goods that he is not their owner, asks the carrier for the amount of the charges and pays an amount named by the carrier less than the rates established by the tariffs filed and published in compliance with the interstate commerce act and receives the goods, he is not bound by the terms of the contract to which he was not a party and of which he had no notice. *Ibid.*

In the case in which the point above stated was decided, it was said that it was not necessary to consider what would have been the rights and obligations of the parties if the bill of lading had contained the express stipulation that the consignee alone should pay the freight as a condition precedent to delivery to him. *Ibid.*

Where, however, the consignee before the shipment had been informed at his own request by the freight traffic manager of the carrier of the correct rates with specific references to the published tariffs, a finding was warranted that he knew and expected to pay the legal tariff rates and accepted the goods understanding that the carrier required the payment of the legal charges, and accordingly that upon those shipments he was liable to pay to the carrier the balance above the undercharges. *Ibid.*

Upon further evidence in the same action it was held that under the circumstances shown the plaintiff had the right to treat the defendant as the owner of these three carloads of fruit and that the jury were warranted in drawing the inference and consequently finding that the defendant impliedly agreed to pay the established interstate charges. Following New York, New Haven, & Hartford Railroad *v.* York & Whitney Co. 215 Mass. 36. *Ibid.*

INVITED PERSON.

See that subtitle under NEGLIGENCE.

JUDGMENT.

A judgment in an action of contract is not subject to reversal upon a writ of error merely because the officer's return upon the writ states that, after making a nominal attachment, he left the summons "at his [the defendant's] last and usual place of abode," without adding the words "known to me to be such," the only reasonable interpretation of such a return being that the officer knew the facts to be as averred in his return, which showed a compliance with the requirements of R. L. c. 167, § 31. *Joyce* v. *Thompson*, 254.

In the absence of fraud or collusion, a judgment entered against two defend-

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ants in the lawful exercise of the power of the court is conclusive against a surety upon a bond to dissolve an attachment given by one of the defendants. *Salvin* v. *Sidman*, 278.

Accordingly, it is not a valid defence on the part of such surety in an action against him upon such a bond, that the judgment was entered before the time had expired for the filing of an answer by his principal's co-defendant, who had been made a party defendant by an amendment after the giving of the bond. *Ibid.*

JURISDICTION.

Although in R. L. c. 152, §§ 1–5, defining the jurisdiction of our courts in divorce cases, there is no reference to cross libels, the right of a libellee to file a cross libel has been recognized and the practice long has prevailed in this Commonwealth. *Friedrich* v. *Friedrich*, 59.

If a husband, who has lived in this Commonwealth for five years, brings a libel for divorce for cruel and abusive treatment against his wife, who has her domicil in another State, and the wife appears and files a cross libel against her husband on the ground of desertion and he enters an appearance by counsel, the dismissing of the husband's libel for want of prosecution does not take away the jurisdiction of the court over the libel of the wife. *Ibid.*

Where at the time of the filing of a petition in bankruptcy the property of the bankrupt was in the hands of a receiver appointed by the Superior Court, that court has jurisdiction to settle the accounts of its receiver relating to his charge of the property up to the time of the adjudication in bankruptcy some months after the filing of the petition. *Shannon* v. *Shepard Manuf. Co. Inc.* 224.

Where upon a petition to the Superior Court, alleging that the debts of a certain corporation carrying on an established manufacturing business were not being paid although its assets were sufficient for that purpose and containing no allegation of insolvency, that court appointed a receiver, and afterwards in bankruptcy proceedings a trustee of the corporation was appointed, who appealed from a decree of the Superior Court allowing the receiver's account, it was held, under the circumstances, that the Superior Court, which rightly appointed the receiver, had jurisdiction of all questions relating to his accounting and final discharge, including the fixing of the amounts of compensation for him and his attorneys. *Ibid.*

A voluntary appearance and a plea *in nullo est erratum* by the defendant in a writ of error, without any objection to the jurisdiction, nearly a year after the entry of the petition for the writ, confers jurisdiction of the subject matter and of the person of the defendant upon this court, although, after the writ was served upon the court to which it was directed and the record of the judgment sought to be reversed had been returned, no writ of scire facias to the defendant was issued. *Joyce* v. *Thompson*, 254.

By reason of the provisions of a certain policy of life insurance issued by a mutual life insurance company incorporated in the State of New York and because the policy must be construed according to the laws of the State of New York, it was held that the courts of this Commonwealth would not take jurisdiction of a suit in equity by a citizen of the Commonwealth against the company to determine the amount which should be paid by the

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plaintiff as premiums, to restrain the defendant from declaring the policy forfeited and to compel it to accept a certain amount as full payment of premiums instead of a larger amount fixed by a vote of the directors of the corporation. *Richards* v. *Security Mutual Life Ins. Co.* 320.

Property impounded by order of a police court for the purposes of the prosecution of a complaint "until further order of said court" cannot be reached by trustee process until the impounding has been brought to an end by a further order of the court. *Wallace* v. *Coyne*, 475.

In order to reach such impounded property by an attachment on trustee process it is not enough to show that the proceedings in which the property was impounded have been disposed of and that the time has come to bring the impounding order to an end. *Ibid.*

It is necessary to show that the further order of the police court has been made which alone can terminate the impounding. *Ibid.*

The fact, that the district attorney who had charge of the prosecution in which the property was impounded was willing that the impounding should be ended, does not show that it has been ended. *Ibid.*

Whether property impounded by such an order of court is held by its custodian as a public officer who is accountable for it merely as such officer within R. L. c. 189, § 31, cl. 3, it here was not necessary to consider. *Ibid.*

Removal of suits from Superior Court to the District Court of the United States, see Removal of Suits.

Equity Jurisdiction, see that title.

Of Probate Court, see that title.

JURY AND JURORS.

R. L. c. 167, § 110, amended by St. 1909, c. 190, does not violate the right to trial by jury secured by the Constitution. *Shea* v. *Peters*, 197.

If a juror during the trial of an action of tort on his own initiative privately takes a view of premises, the character of which is an issue at the trial, thus obtaining evidence outside of that introduced in the court room, such conduct does not require a new trial as a matter of law; and where, upon a motion for a new trial based upon such conduct of the juror, the trial judge finds, on evidence warranting the finding, that the conduct of the juror did no harm to the party against whom a verdict was rendered, the judge in his discretion may deny the motion. *Collins* v. *Splane*, 281.

Action of the judge presiding at a trial, when, after a jury, which had separated after having agreed on answers to special questions relating to liability but had failed to agree as to an answer relating to damages, reported to court and the judge had satisfied himself that an agreement might be reached as to the unanswered question and that no member of the panel had talked with anybody in any manner about the case, in ordering the jury to return to their room and consider the unanswered question further and, upon their return with an answer, in ordering a finding for the plaintiff based thereon, was held not to be an improper exercise of his discretion. *Charles* v. *Boston Elevated Railway*, 536.

Upon the impanelling of a jury after the entry of a *nolle prosequi* as to so much of an indictment for murder as charged a crime greater than manslaughter, the defendant was not entitled to challenge peremptorily more than two jurors. *Commonwealth* v. *Wakelin*, 567.

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LAND COURT.

It was held that certain evidence admitted unqualifiedly and without any objection or exception at the hearing of a petition for the registration of the title to certain land where the existence of a way by necessity is an issue, as to the expressed intention of a former owner of the locus, in conveying it to another, that the grantee would use, to reach a public way otherwise inaccessible excepting over the remaining land of the grantor, a way across land then owned by the grantee's wife, must be given proper probative force and that its admissibility could not be considered by this court. *Orpin* v. *Morrison*, 529.

Where, at the close of all the evidence at the hearing of the petition above described, the judge ruled that the evidence described was competent and an exception was taken, such ruling and exception do not bring to this court the question of the admissibility or competency of the evidence. *Ibid.*

LANDLORD AND TENANT.

In an action against the owner of a building for personal injuries caused by ice which fell from the roof, it was admitted that, although parts of the defendant's building were rented to tenants, the roof was under the defendant's care and control, and it was held that, if the jury found that ice of the size described by the plaintiff came from the roof and struck the plaintiff, they would be warranted in finding for the plaintiff. *Connors* v. *Richards*, 436.

Apportionment of damages between life tenant and remainderman when property is taken or damaged under statutory authority. *Mills* v. *Samuels*, 1.

LAND REGISTRATION.

See LAND COURT.

LAW OF THE CASE.

In a suit in equity for an accounting, a decision of this court at a previous stage of the same case had ordered that, in the accounting, interest should be allowed on the whole amount due to the plaintiff "from the date of settlement to the date of filing the bill," and it was pointed out that this was the law of the case. *Arnold* v. *Maxwell*, 441.

LEGACY.

See DEVISE AND LEGACY.

LETTER.

In an action on a promise to pay a note of a certain corporation held by the plaintiff, in which the defendant pleaded and relied on the statute of frauds, correspondence, including a letter signed by the defendant and containing an unambiguous recognition of the alleged contract, was held to be a sufficient memorandum to satisfy the statute although the letter also contained

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an express repudiation of the contract. *George Lawley & Son Corp.* v. *Buff*, 21.

Neither a certain letter written by a customer to a stockbroker before he learned of certain improper sales by the stockbroker to himself of securities of the customer, nor the bringing of an action against the stockbroker, in the course of the trial of which the customer for the first time learned of the sales, could be regarded as a repudiation of them. *Hall* v. *Paine*, 62.

Where an alleged contract for the sale of goods was made, if at all, wholly by letters, telegrams and cablegrams, in which no ambiguous words or terms were employed, and where the circumstances under which the correspondence took place are not in controversy, the question whether a contract was made is one of law for the court. *Kehlor Flour Mills Co.* v. *Linden*, 119.

LICENSE.

Provisions of St. 1913, c. 429, and of an ordinance of the city of Springfield, delegating to the police commission of that city the licensing and regulating of the transportation of passengers for hire by motor vehicles, requiring the filing of a bond and fixing a license fee, were held to be constitutional and valid. *Commonwealth* v. *Slocum*, 180.

LIEN.

MECHANIC'S LIEN, see that title.

LIMITATIONS, STATUTE OF.

In a suit under R. L. c. 99, §§ 4, 6, for money paid as margin on wagering contracts, where four series of transactions were alleged and the defendant set up the statute of limitations, if the first two series had been balanced and the plaintiff had given to the defendant a receipt in full covering them more than six years before the filing of the bill, the different series of transactions were distinct from each other and not an open running account, and the statute of limitations was a bar to the action upon the first two series of transactions. *Houghton* v. *Keveney*, 49.

In an action for the price of goods sold and delivered, in which the statute of limitations was pleaded, there were two accounts, the last item on the old account being more than six years before the date of the writ, and it was held that the plaintiff had no right to apply an accidental over-payment on the new account to the old account and thus create a payment which would take that account out of the statute of limitations by which otherwise it was barred. *Spinney* v. *Freeman*, 356.

MAIL.

One, who was under contract with the federal government to carry mail from mail trains at a certain railroad station to a post office near by, was held under the circumstances not to have been a trespasser nor a mere licensee while passing from a train upon a siding from which he had taken mail along a cinder walk between the siding and the main track to go to the platform of the station. *French* v. *Boston & Maine Railroad*, 163.

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Action by such carrier of mail for personal injuries caused by his being struck by a passing train as he was so engaged. *French* v. *Boston & Maine Railroad*, 163.

MANDAMUS.

An acceptance of a tender of a resignation by a police officer more than six years after it was delivered is ineffectual, and after such an acceptance the officer may maintain a petition for a writ of mandamus to compel his restoration to the police force. *Larrivee* v. *Chief of Police of Newton*, 169.

MARRIAGE AND DIVORCE.

Proceedings in General.

Although libels for divorce are not suits in equity but belong on the law side of the court and the Superior Court sitting to hear them has not general equity powers, yet by R. L. c. 152, § 29, that court "may, if the course of proceeding is not specially prescribed, hear and determine all matters coming within the purview of this chapter [relating to divorce] according to the course of proceeding . . . in courts of equity." *Friedrich* v. *Friedrich*, 59.

Cross Libel.

Although in R. L. c. 152, §§ 1–5, defining the jurisdiction of our courts in divorce cases, there is no reference to cross libels, the right of a libellee to file a cross libel has been recognized and the practice long has prevailed in this Commonwealth. *Friedrich* v. *Friedrich*, 59.

If a husband, who has lived in this Commonwealth for five years, brings a libel for divorce for cruel and abusive treatment against his wife, who has her domicil in another State, and the wife appears and files a cross libel against her husband on the ground of desertion and he enters an appearance by counsel, the dismissing of the husband's libel for want of prosecution does not take away the jurisdiction of the court over the libel of the wife. *Ibid.*

Objections to Decree Absolute.

The Superior Court had authority to establish Divorce Rule 6, relating to objections to the granting of a decree absolute. *Feldman* v. *Feldman*, 330.

Objections, which, it was held, properly might be dismissed as not complying with the requirement of Divorce Rule 6, that the facts upon which such objections are founded shall be "set forth specifically." *Ibid.*

A judge, before whom was tried a libel for divorce and by whose order a decree *nisi* had issued, within six months after which objections were filed to the entry of a decree absolute which could not be sustained because they did not comply with the requirements of Divorce Rule 6, may refuse to entertain a "supplemental objection" filed eight months after the entry of the decree *nisi*, which is not an amendment of the objections formerly filed but contains a new charge alleging adultery by the libellant within six months after the entry of the decree *nisi*. *Ibid.*

Whether, as a matter of discretion, the judge had power to allow new objections to be filed more than six months after the entry of the decree *nisi* and

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before the entry of a decree absolute, or to allow those formerly filed to be amended, was not determined, because in this case the judge refused to exercise any discretion in favor of the objections. *Feldman* v. *Feldman*, 330.

Dependency under Workman's Compensation Act.

A woman to whom an award was made under the workmen's compensation act as the dependent widow of a deceased employee is entitled to receive the payments during the whole of the period covered by the award if she lives so long, and her right to compensation does not cease by reason of her marriage before the expiration of the period to another man able and willing to support her. *Bott's Case*, 152.

MARRIED WOMAN.

See HUSBAND AND WIFE.

MARSHALLING ASSETS.

It was held to have been unnecessary to determine whether, by the application of the doctrine of the marshalling of assets, in the case of a testatrix who made a will which both executed a power and disposed of property of her own, the same result could have been arrived at as was reached by application of the rule that the testamentary purpose to avoid intestacy should be carried out by first applying the property subject to appointment to those portions of the will which could operate lawfully as appointments, leaving the remaining gifts to be satisfied out of the testatrix's own estate and thus carrying into effect all the provisions of the will. *Minot* v. *Paine*, 514.

MASTER AND SERVANT.

See AGENCY; NEGLIGENCE, *Employer's Liability;* WORKMEN'S COMPENSATION ACT.

MECHANIC'S LIEN.

St. 1915, c. 292, § 13, which became effective on January 1, 1916, does not affect a petition for the enforcement of a mechanic's lien filed previous to that date. *Goldstein* v. *Tucker*, 259.

Where the owner of certain land executed and delivered to a petitioner for the establishment of a mechanic's lien upon the land a bond to dissolve the lien with sureties properly approved, and the petitioner thereupon told one who proposed to purchase the land that the lien was discharged and waived by the giving of the bond but the bond was not recorded within ten days as required by R. L. c. 197, § 28, as amended by Sts. 1906, c. 223; 1909, c. 237, and the land was purchased it was held that under the circumstances the petitioner had not thereby waived his lien, nor was he estopped, by reason of his representation based on a false idea as to the law, from pursuing his petition to judgment and sale. *Ibid.*

An attorney at law, retained to prosecute a petition for the enforcement of a mechanic's lien, has no authority, by reason of his general retainer, to bind

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his client by statements to a stranger as to the effect of an unrecorded bond to dissolve the lien. *Goldstein* v. *Tucker*, 259.

A statement of an attorney at law for a petitioner to enforce a mechanic's lien to a stranger, to the effect that the execution and delivery of a bond to dissolve the lien, which bond is unrecorded, dissolved the lien, is merely an expression of an opinion on a question of law, and, even if authorized by his client, will not operate to estop the client from prosecuting his lien. *Ibid.*

For the purpose of enforcing a mechanic's lien which came into existence before January 1, 1916, R. L. c. 197, § 10, was not repealed by St. 1915, c. 292, § 13. *Ainslee* v. *Boscketti*, 577.

MINOR.

See INFANT.

MISTAKE.

An unwarranted mistake by one of the parties to a contract in writing as to the meaning of the contract is no excuse for a breach of the contract by him due to such unreasonable misunderstanding. *Kehlor Flour Mills Co.* v. *Linden*, 119.

MORTGAGE.

Of Real Estate.

Redemption.

It was held that a bill in equity might be maintained by one partner against his copartner for an accounting and for redemption from mortgages of real estate held by one of the defendants, although there had not been a previous tender, if the bill contained an offer of the plaintiff to pay what might be found to be due upon the mortgages and a prayer for an order of redemption. *Skolnick* v. *Greenburg*, 359.

In view of the allegations in such a bill, it was held that it was not multifarious, the two subjects of the partnership accounting and the redemption of the real estate from the mortgages being sufficiently connected with one another to allow their joinder in one bill. *Ibid.*

Foreclosure.

A statement in a notice of a sale in foreclosure of a mortgage of real estate, that the premises would be sold "subject to the amount unpaid on a prior mortgage of record of $5,500 . . . and all unpaid taxes, liens and assessments," does not make the sale invalid by reason of the fact that the amount due on the prior mortgage at the time of the notice was $5,275. *Ananian* v. *Melkon*, 322.

A suit in equity to have a second mortgage of real estate declared invalid because procured by fraud, to have a sale in foreclosure declared invalid because the plaintiff, the mortgagor, was not notified and the sale was carried out by a fraudulent conspiracy in which the purchaser shared, and to permit the plaintiff to redeem, properly was dismissed where it appeared from findings of a master confirmed by the trial judge that the facts were not as alleged in the bill. *Ibid.*

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Accounting after foreclosure.

The holder of a third mortgage on real estate may maintain a suit in equity against the holder of a second mortgage on the same property, who has foreclosed his mortgage and has become the purchaser of the property at the foreclosure sale but who has refused to complete the foreclosure by making a deed to himself under a power contained in the second mortgage, to compel the defendant to pay to the plaintiff the surplus of the purchase money after the satisfaction of the debt to the defendant secured by the second mortgage. *Pilok* v. *Bednarski*, 56.

MOTOR VEHICLE.

Provisions of St. 1913, c. 429, and of an ordinance of the city of Springfield, delegating to the police commission of that city the licensing and regulating of the transportation of passengers for hire by motor vehicles, requiring the filing of a bond and fixing a license fee, were held to be constitutional and valid. *Commonwealth* v. *Slocum*, 180.

Evidence at the trial of an action for personal injuries resulting from an accident caused by negligence of the driver of a motor vehicle, which tends merely to show that the defendant, who was not in the vehicle at the time of the accident, owned the vehicle and that the driver was in his general employ, is not sufficient to warrant a finding that at the time of the accident the driver was acting within the scope of his employment. *Gardner* v. *Farnum*, 193.

Further evidence which, it was held, did not warrant an inference that the chauffeur was upon an errand for the defendant nor that he was acting within the scope of his employment at the time of the accident. *Ibid.*

Before the passage of St. 1915, c. 87, any person travelling on a highway in an unregistered motor vehicle was a trespasser upon the highway and, if he was injured by a collision of the motor vehicle with a street railway car, he could hold the street railway corporation liable for his injuries only by showing that the collision was caused by the wilful or wanton conduct of its motorman or of some other of its agents. *Wentzell* v. *Boston Elevated Railway*, 275.

Insurance of, see subtitle under INSURANCE.

Negligent Operation.

Cases involving questions of negligent operation of motor vehicles, see appropriate subtitle under NEGLIGENCE.

MUNICIPAL CORPORATIONS.

By-laws and Ordinances.

If an ordinance of a city contains some provisions which are valid and some which are unconstitutional and void, and those which are invalid are so distinct and severable that, notwithstanding their invalidity, the remainder of the ordinance may stand as valid, and if the ordinance is amended to correct the invalid provisions, it constitutes after amendment a single

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statutory entity and is to be construed as a whole. *Commonwealth* v. *Slocum*, 180.

Provisions of St. 1913, c. 429, and of an ordinance of the city of Springfield, delegating to the police commission of that city the licensing and regulating of the transportation of passengers for hire by motor vehicles, requiring the filing of a bond and fixing a license fee, were held to be constitutional and valid. *Ibid.*

Building Inspector.

Under R. L. c. 104, §§ 22, 55, relating to the filing of a copy of the plans for the erection of a school house with the inspector of factories and public buildings for the district in which it is to be erected, a contractor engaged in the erection of a school house is not required to file a copy of the plans, and his failure to do so does not deprive him of any rights under the contract. *Ordway* v. *Newburyport*, 306.

The issuing of a certificate of the inspector of factories and public buildings indorsed with the approval of the chief of the district police, which is mentioned in § 22, is not a condition precedent to recovery from the city by one who has supplied materials and labor for heating and ventilating the school house in accordance with his contract to do so. *Ibid.*

In such an action on a contract for heating and ventilating the school house building the fact, that the plaintiff knew that the inspector had disapproved the plans submitted for heating the building, does not deprive him of his right to recover, if he has performed fully the work required by the plans and the specifications in his contract and if the disapproval of the inspector related wholly to a defect in the work done by the general contractor for the building of the school house. *Ibid.*

Right as Purchaser at Tax Sale.

Where a city becomes the purchaser of land sold by its collector of taxes at a tax sale, it receives a title subject to the later and paramount lien that may arise from taxes assessed after those for the collection of which the sale was made. *Chadwick* v. *Cambridge*, 580.

Upon a petition in the Land Court under St. 1915, c. 237, § 4, by the holder of a tax title to land in a city for the foreclosure of the right of redemption therefrom, it is proper for the trial judge to rule that the petitioner's title was paramount to titles acquired by the city through deeds of its collector of taxes to it as the purchaser at previous sales for the collection of taxes assessed and due in previous years. *Ibid.*

MUNICIPAL COURT.

See Police, District and Municipal Courts; Municipal Court of the City of Boston.

MUNICIPAL COURT OF THE CITY OF BOSTON.

The "final decision of the Appellate Division" of the Municipal Court of the City of Boston from which by St. 1912, c. 649, § 9, a right to appeal directly

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to this court is given, means a decision which terminates litigation on the merits of the controversy, directs what judgment shall be entered and leaves nothing to the judicial discretion of the trial court. *Real Property Co. Inc.* v. *Pitt*, 526.

A decision of the Appellate Division of the Municipal Court of the City of Boston ordering a new trial of an action is not a decision from which an appeal lies directly to this court. *Ibid.*

An appeal to this court from an order of the Appellate Division, upon a report after a finding for the defendant, giving the plaintiff leave to amend the declaration within ten days, in which case there should be a new trial upon the declaration as amended, and ordering that otherwise the report should be dismissed, which appeal was claimed within the ten days after the order, must be from that part of the order of the Appellate Division which gave the plaintiff leave to amend in ten days and ordered a new trial if the amendment were made. *Hall Publishing Co.* v. *MacLaughlin*, 534.

Such an order of the Appellate Division is not within the ten days a "final decision" of the Appellate Division from which an appeal will lie to this court; and a claim of an appeal by the defendant within the ten days must be dismissed. *Ibid.*

An order of the Appellate Division of the Municipal Court of the City of Boston denying a motion to recommit a report to the trial judge for amendment or amplification is not subject to revision. *Knudson* v. *General Motorcycle Sales Co. Inc.* 54.

An order of the Appellate Division of the Municipal Court of the City of Boston dismissing a report must be taken to be a denial of a motion previously made to recommit the report to the trial judge for amendment or amplification. *Ibid.*

The question, whether evidence as to damages, presented at the trial in the Municipal Court of the City of Boston of an action of contract for a breach of an agreement of employment, was admissible or was too uncertain and remote, is not raised upon a report of the trial judge stating that the defendant asked for and he refused to give a ruling that "on all the evidence the plaintiff is not entitled to recover," where there was evidence warranting a finding that the contract was broken by the employer and the judge so found. *Mills* v. *U. S. Slicing Machine Co.* 95.

MURDER.

See HOMICIDE.

NARCOTIC DRUGS.

On the evidence at the trial of an indictment under St. 1915, c. 187, § 2, charging a physician with prescribing narcotic drugs, it was held that it was a question of fact for the jury whether the defendant believed that the drugs prescribed by him were needed for the treatment of the persons for whom he prescribed, or whether he was engaged in the business of issuing prescriptions to habitual drug users solely for his pecuniary gain and without reference to the question whether such drugs were needed by those who obtained them or not. *Commonwealth* v. *Noble*, 83.

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In the case above described it was held that the presiding judge properly refused to rule "that, being the attending physician in the cases referred to in the indictment, he was the only person who could then determine the obvious necessity for the therapeutic treatment after examination and history of the patient; that his judgment in the matter was conclusive and could not be reviewed or inquired into in a court of law in a trial of an indictment of this kind." *Commonwealth* v. *Noble*, 83.

It was said, that to hold that the defendant's honesty of purpose could not be inquired into would be to defeat the manifest purpose of the act. *Ibid.*

NATIONAL BANK.

Whether under the national bank act and before the passage of the federal reserve bank act, U. S. St. 1913, c. 6, § 11 k, a national bank had authority to accept a will for safe keeping and would be legally liable for a failure to deliver according to directions a will thus accepted in custody, here was referred to as a question which it was unnecessary to consider. *Sawyer* v. *Old Lowell National Bank*, 342.

NEGLIGENCE.

Plaintiff's Due Care: Contributory Negligence.

Of a carrier of mail at a railroad station. *French* v. *Boston & Maine Railroad*, 163.

Of a woman thrown from a carriage driven by her husband before the passage of St. 1914, c. 553, when the horse stumbled into an excavation. *Charles* v. *Boston Elevated Railway*, 536.

Of a workman engaged with others in moving a heater in a factory and injured by its falling due to a leg coming out of a groove. *Winston* v. *Converse Rubber Shoe Co.* 449.

Of a workman in a sand pit run into by a flat car. *Fratto* v. *Boston Elevated Railway*, 388.

Of an employee injured by electricity while on a pole holding both telephone and high tension electric wires. *Murphy* v. *Old Colony Street Railway*, 333.

Of one who, having received a transfer check and left a street car, was passing in the street to a connecting car, when she was struck by the overhang of the car she had left as it turned a curve into a car barn. *Niles* v. *Boston Elevated Railway*, 316.

Of a member of an engineering crew who was killed by reason of the breaking of a rope by which he was being suspended for the purpose of making measurements on a cliff. *Hix* v. *New York Central & Hudson River Railroad*, 309.

On the evidence at the trial of an action against the owner of a motor car by a woman for personal injuries received after the passage of St. 1914, c. 553, as she was about to cross a street much used by motor cars, it was held that the plaintiff was entitled to go to the jury upon the question of her due care with the burden upon the defendant affirmatively to prove contributory negligence. *Chaplin* v. *Brookline Taxi Co.* 155.

In an action against a street railway company for personal injuries received by a child two and one half years of age, it was assumed that St. 1914, c. 553, was not applicable. *Sughrue* v. *Bay State Street Railway*, 363.

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St. 1914, c. 553, § 1, does not change the substantive law of negligence. The tribunal hearing an action of tort for personal injuries or death alleged to have been caused by negligence still must be satisfied on all the evidence that the plaintiff or the decedent was in the exercise of due care and did not by his own acts of omission or commission help to produce his injury or death, and that the defendant was negligent. *Duggan* v. *Bay State Street Railway*, 370.

Detailed statement of the changes wrought by the provisions of St. 1914, c. 553, § 1, that "In all actions, civil or criminal, to recover damages for injuries to the person or property or for causing the death of a person, the person injured or killed shall be presumed to have been in the exercise of due care," in the rules of law previously in force in actions for injury to person or property through negligence and in actions for the negligent causing of death. *Ibid.*

Effect of the further provision of the same section of the statute, that contributory negligence on the part of a person, who has been so injured or killed or whose property has been damaged, "shall be an affirmative defence to be set up in the answer of, and proved by the defendant." *Ibid.*

The provision of § 2 of the above statute, repealing all acts and parts of acts inconsistent with § 1, is ancillary to the chief object of the statute and is not in itself in any way unconstitutional. *Ibid.*

The inference of due care on the part of the plaintiff or decedent in the actions described in the above statute, which by the statute is made a presumption of fact, is not arbitrary nor irrational. *Ibid.*

St. 1914, c. 553, as above construed, does not contravene any provision of the Constitution of the Commonwealth or of the Fourteenth Amendment to the Federal Constitution. *Ibid.*

The provisions of St. 1914, c. 553, § 1, do not require necessarily that in every action therein described, when tried before a jury, the due care of the person who was injured or damaged or whose death was caused becomes a question of fact which must be submitted to the jury. *Ibid.*

Where from facts, which are undisputed or indisputable or are shown by evidence by which the plaintiff is bound, only one rational inference can be drawn and that is an inference of contributory negligence or want of due care, then the question of due care or contributory negligence is one of law for the court and a verdict for the defendant should be ordered. *Ibid.*

In an action of tort for personal injuries, where the defence of contributory negligence is set up in the answer and the evidence shows that the plaintiff necessarily must have been negligent, St. 1914, c. 553, does not require the submission of the case to the jury. *Pigeon* v. *Massachusetts Northeastern Street Railway*, 392.

On the evidence at the trial of four actions of tort against a street railway corporation for personal injuries sustained after the enactment of St. 1914, c. 553, by being run into by an electric street railway car of the defendant when the plaintiffs were travelling in a motor butcher cart driven by one of them, it was held that the only reasonable conclusion was that the negligent conduct of each of the plaintiffs helped to bring on the accident, so that a verdict rightly was ordered for the defendant in each of the cases. *Ibid.*

In the cases above described it was held that, although the absence of an

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operating license was some evidence of negligence on the part of this plaintiff in operating the car, it was not conclusive and did not warrant the ordering of a verdict for the defendant as against that plaintiff, and, in deciding on other evidence that all the plaintiffs were negligent as matter of law, this court did not consider as an element the absence of an operating license. *Pigeon* v. *Massachusetts Northeastern Street Railway*, 392.

Whether the provisions of St. 1911, c. 751, Part I, § 1, deprive a railroad corporation which is not a subscriber under the workmen's compensation act of the defences of contributory negligence and assumption of risk in an action brought against it under St. 1906, c. 463, Part I, § 63, as amended by St. 1907, c. 392, and St. 1912, c. 354, for causing the death of one of its employees, here was mentioned as a question which it was not necessary to decide in the present case. *Hix* v. *New York Central & Hudson River Railroad*, 309.

On the evidence at the trial of an action by a child six years of age who was run into by a motor vehicle on the highway after she had separated from an older child with whom she was crossing the street, it was held that the question, whether the plaintiff exercised that degree of care which under the circumstances she ordinarily would be expected to exercise, was for the jury. *Miller* v. *Flash Chemical Co.* 419.

Where, at the trial of the action above described, the defendant asked for no specific instructions and excepted only to the denial of a motion that a verdict be ordered in his favor, and where the evidence warranted findings that the plaintiff was capable of exercising due care in her own behalf and, when injured, was exercising such care and the jury found for the plaintiff, it is immaterial whether the provisions of St. 1914, c. 553, would apply to an action for personal injuries received by a child not capable of caring for herself. *Ibid.*

Due Care of Child.

In an action against a street railway company for personal injuries received by a child two and one half years of age, it was assumed that St. 1914, c. 553, was not applicable. *Sughrue* v. *Bay State Street Railway*, 363.

It cannot be ruled as matter of law that a child six years of age is too young to be alone and unattended upon a highway in a city and to pass from one side of a street to the other while on the way to and from school. *Miller* v. *Flash Chemical Co.* 419.

In an action by a girl against a corporation to recover for personal injuries received by her when six years of age by being run into by a motor vehicle as she was crossing a street in a city on the way home from school after she had slipped away from a child in whose charge she had been put, the question, whether the plaintiff was of an age capable of exercising due care for her own safety, is for the jury. *Ibid.*

The mere fact, that the plaintiff, in the action above described, "never went alone to and from school but always was accompanied by some older person," does not conclusively establish the fact that the plaintiff was not capable of exercising due care for her own safety. *Ibid.*

On the evidence at the same trial it was held that the question, whether the plaintiff exercised that degree of care which under the circumstances she ordinarily would be expected to exercise, was for the jury. *Ibid.*

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Due Care of Person in Charge of Child.

In an action against a street railway company for personal injuries to a child whose mother had left her in the custody of her older sister upon a sea beach near the street railway line, it was held that findings were warranted that the mother was justified in leaving the child in the charge of her older sister, and that the sister in the performance of her duty as custodian did all that could be expected of an ordinarily prudent girl of her age. *Sughrue* v. *Bay State Street Railway*, 363.

Due Care of Plaintiff's Decedent.

St. 1914, c. 553, § 1, does not change the substantive law of negligence. The tribunal hearing an action of tort for personal injuries or death alleged to have been caused by negligence still must be satisfied on all the evidence that the plaintiff or the decedent was in the exercise of due care and did not by his own acts of omission or commission help to produce his injury or death, and that the defendant was negligent. *Duggan* v. *Bay State Street Railway*, 370.

Detailed statement of the changes wrought by the provisions of St. 1914, c. 553, § 1, that "In all actions, civil or criminal, to recover damages for injuries to the person or property or for causing the death of a person, the person injured or killed shall be presumed to have been in the exercise of due care," in the rules of law previously in force in actions for injury to person or property through negligence and in actions for the negligent causing of death. *Ibid.*

Effect of the further provision of the same section of the statute, that contributory negligence on the part of a person, who has been so injured or killed or whose property has been damaged, "shall be an affirmative defence to be set up in the answer of, and proved by the defendant." *Ibid.*

The inference of due care on the part of the plaintiff or decedent in the actions described in the above statute, which by the statute is made a presumption of fact, is not arbitrary nor irrational. *Ibid.*

St. 1914, c. 553, as above construed, does not contravene any provision of the Constitution of the Commonwealth or of the Fourteenth Amendment to the Federal Constitution. *Ibid.*

The provisions of St. 1914, c. 553, § 1, do not require necessarily that in every action therein described, when tried before a jury, the due care of the person who was injured or damaged or whose death was caused becomes a question of fact which must be submitted to the jury. *Ibid.*

Where from facts, which are undisputed or indisputable or are shown by evidence by which the plaintiff is bound, only one rational inference can be drawn and that is an inference of contributory negligence or want of due care, then the question of due care or contributory negligence is one of law for the court and a verdict for the defendant should be ordered. *Ibid.*

On the evidence at the trial of an action by an administrator against a street railway corporation under St. 1906, c. 463, Part I, § 63, as amended by St. 1907, c. 392, for causing the death of the plaintiff's intestate after he had alighted from a car of the defendant by his being struck and instantly killed by another car of the defendant coming on a parallel track from the opposite direction, it was held that, although, if the accident had happened

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before the passage of St. 1914, c. 553, there would have been no evidence to go to the jury on this issue, yet, with the presumption created by the statute and the burden placed on the defendant to prove contributory negligence, it could not be ruled as matter of law that the negligence of the intestate contributed to his death, and the question of his negligence was for the jury. *Mercier* v. *Union Street Railway*, 397.

In the case above described it was said that it was not necessary in that case to determine whether St. 1914, c. 553, § 2, made any change in the degree of care on the part of the person killed which is required by the statutes imposing penalties for causing death. *Ibid.*

Imputed.

Upon the evidence at the trial of an action by the administrator of the estate of a woman against a street railway company for personal injuries suffered and death caused before the passage of St. 1914, c. 553, it appeared that the plaintiff's intestate was thrown from a carriage upon a public street in a city because the horse drawing the carriage, driven by her husband, fell into a hole in the street between street car rails which the defendant had undertaken to guard, and it was held that findings were warranted that both the husband and the wife were in the exercise of due care. *Charles* v. *Boston Elevated Railway*, 536.

Invited Person.

One, who was under contract with the federal government to carry mail from mail trains at a certain railroad station to a post office near by was held under the circumstances not to have been a trespasser nor a mere licensee while passing from a train upon a siding from which he had taken mail along a cinder walk between the siding and the main track to go to the platform of the station. *French* v. *Boston & Maine Railroad*, 163.

Acts of one of several contractors engaged in the construction of a building in the placing of a ladder were held not to amount to an invitation to an employee of another contractor to use the ladder but at most to a license to do so. *Morrissey* v. *Boston & Maine Railroad*, 171.

In an action by the owner of a motor boat against a lighter company for personal injuries caused by the giving way of apparatus of the defendant, which was being used to raise the stern of a tug owned by a third party while the plaintiff was beneath the stern with his boat carrying the tug's engineer in order that the engineer might remove a hawser which had become entangled in the propeller, it is unnecessary for the plaintiff, in order to show that he rightfully was there, to show more than that he undertook to assist at the request of the captain of the tug. *Collins* v. *Splane*, 281.

Licensee or Trespasser.

One, who was under contract with the federal government to carry mail from mail trains at a certain railroad station to a post office near by, was held under the circumstances not to have been a trespasser nor a mere licensee while passing from a train upon a siding from which he had taken mail along a cinder walk between the siding and the main track to go to the platform of the station. *French* v. *Boston & Maine Railroad*, 163.

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No degree of negligence can make one liable for an injury to a trespasser. To establish such liability it must be shown that the person who injured the trespasser was a wilful or wanton wrongdoer in causing the injury. *Wentzell* v. *Boston Elevated Railway*, 275.

Before the passage of St. 1915, c. 87, any person travelling on a highway in an unregistered motor vehicle was a trespasser upon the highway and, if he was injured by a collision of the motor vehicle with a street railway car, he could hold the street railway corporation liable for his injuries only by showing that the collision was caused by the wilful or wanton misconduct of its motorman or of some other of its agents. *Ibid.*

Conduct of a motorman operating a street railway car in a city street and running into a motor car, which, although it was evidence of negligence, was not evidence of wanton or reckless misconduct on the part of the motorman which would make the street railway corporation liable to a trespasser on the highway in the motor car injured by the collision. *Ibid.*

Assumption of Risk.

See that subtitle under *Employer's Liability, post.*

Employer's Liability.

Assumption of risk.

In an action for personal injuries by an employee against a corporation organized for and engaged in a work which is a public charity, and which is not a subscriber under the workmen's compensation act, where it appears that the plaintiff was injured upon a buzz planer negligently permitted by the defendant to be operated without a guard, if it also appears that the risk of injury to the plaintiff from that cause was an obvious one which could be seen by reasonable observation on his part, he is precluded from recovery either under the employers' liability act or at common law. *Zoulalian* v. *New England Sanatorium & Benevolent Association*, 102.

Upon the evidence at the trial of an action for the death of a member of an engineering crew caused by the breaking of a rope by which he was being suspended from a cliff, it was held that there was no evidence on which the defendant could set up the defence that the employee had assumed the risk of the injury, if either of those defences was open to it under the statutes. *Hix* v. *New York Central & Hudson River Railroad*, 309.

No assumption of risk by a workman engaged with others in moving a heater in a factory and injured by its falling due to a leg coming out of a groove. *Winston* v. *Converse Rubber Shoe Co.* 449.

If, when an employee gives notice to his employer as to a defect which was in existence and was open and obvious when he entered upon his employment, he insists upon its being made safe and the employer makes a promise to remedy it in such terms as to amount to a new contract of employment whereby the employee agrees to continue in the employment for a new period of service and the employer agrees to remedy the defect, and the defect is not remedied and the employee is injured by reason thereof, St. 1909, c. 363, becomes applicable and the employee will not be held to have assumed the risk of injury from the defect. *Wood* v. *Danas*, 587.

Evidence at the trial of an action by a woman against her employers for such

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injuries from which it was held that it must be inferred that the plaintiff's employment could be terminated at will, and that, upon the evidence, the jury might find that a new contract of service was made, the plaintiff agreeing to continue in the employ for a new term of service and the defendants agreeing to put the stairway in a safe condition. *Wood* v. *Danas*, 587.

Ways, works or machinery.

Certain temporary platforms placed to prevent cargo from falling into the water when a ship was being unloaded were held under the employers' liability act not to be a part of the ways, works or machinery used by the owner of the ship. *Kenneally* v. *Oceanic Steam Navigation Co. Ltd.* 446.

If, when an employee gives notice to his employer as to a defect which was in existence and was open and obvious when he entered upon his employment, he insists upon its being made safe and the employer makes a promise to remedy it in such terms as to amount to a new contract of employment whereby the employee agrees to continue in the employment for a new period of service and the employer agrees to remedy the defect, and the defect is not remedied and the employee is injured by reason thereof, St. 1909, c. 363, becomes applicable and the employee will not be held to have assumed the risk of injury from the defect. *Wood* v. *Danas*, 587.

Evidence at the trial of an action by a woman against her employer for such injuries from which it was held that it must be inferred that the plaintiff's employment could be terminated at will, and that, upon the evidence, the jury might find that a new contract of service was made, the plaintiff agreeing to continue in the employ for a new term of service and the defendants agreeing to put the stairway in a safe condition. *Ibid.*

Superintendence.

On the evidence at the trial of an action for personal injuries and death of a longshoreman, who, when assisting in unloading a ship, fell because a temporary platform which he had been accustomed to use was not in place because the superintendent had caused it to be removed, it was held that there was nothing to show negligence on the part of the superintendent, who had no reason to think that the longshoreman expected to use the platform to stand upon when it was apparent that it had been removed, and that it was not the duty of the superintendent to warn an experienced longshoreman of a danger which was plainly visible. *Kenneally* v. *Oceanic Steam Navigation Co. Ltd.* 446.

Dangerous and defective machinery and appliances.

In an action for personal injuries by an employee against a corporation organized for and engaged in a work which is a public charity, and which is not a subscriber under the workmen's compensation act, where it appears that the plaintiff was injured upon a buzz planer negligently permitted by the defendant to be operated without a guard, if it also appears that the risk of injury to the plaintiff from that cause was an obvious one which could be seen by reasonable observation on his part, he is precluded from recovery either under the employers' liability act or at common law. *Zoulalian* v. *New England Sanatorium & Benevolent Association*, 102.

In an action by a carpenter against his employer for personal injuries sustained before the workmen's compensation act took effect, when the plaintiff was at work piling sawed hard pine lumber by means of an engine, a

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derrick and a pair of tongs and caused by one of the timbers slipping from the tongs due to their being unsuitable and unsafe for hoisting such timbers, it was held not to be a defence that the tongs supplied by the defendant were in common use for the purpose for which the defendant used them, and that a ruling setting aside a verdict for the plaintiff on that ground was wrong. *Wilson* v. *Alexander*, 242.

A finding for the plaintiff was held to have been warranted on the evidence at the trial of an action against a railroad corporation under St. 1906, c. 463, Part I, § 63, as amended by St. 1907, c. 392, and St. 1912, c. 354, for causing the death of one employed by it as a member of an engineering crew that had been engaged in cutting a new piece of road through a ledge, where it appeared that the plaintiff's intestate was killed by the breaking of a rope by which he was being hoisted to the top of a cliff. *Hix* v. *New York Central & Hudson River Railroad*, 309.

In the same action it was held that the defendant's duty of exercising reasonable diligence to furnish its employees with necessary and suitable ropes and to inspect and repair them was none the less the duty of the defendant itself because it was left to be performed by its civil engineer or the foreman of the engineering gang. *Ibid.*

In the case above described it was held that there was no evidence on which the defendant could set up the defence that the employee was negligent or the defence that the employee had assumed the risk of the injury, if either of those defences was open to it under the statutes. *Ibid.*

Upon the evidence at the trial of an action against a street railway corporation by an experienced lineman for personal injuries sustained in the year 1907 when in the defendant's employ, by falling from a pole by reason of coming in contact with the defendant's telephone wires charged with a dangerous current of electricity passed to them from high tension wires maintained by the defendant on another cross arm, it was held that there was no evidence of negligence for which the defendant was liable, it being equally probable that the defendant was not at fault or that the dangerous condition was caused by a fellow servant of the plaintiff for whose negligence the defendant was not legally accountable to the plaintiff. *Murphy* v. *Old Colony Street Railway*, 333.

In the case above described it was said that, there being no evidence to show negligence of the defendant at common law or under the employers' liability act, it had become unnecessary to consider the question of the due care of the plaintiff in failing to use a safety belt with which he was provided or other questions that had been raised at the trial. *Ibid.*

At the trial of an action against a street railway corporation for personal injuries sustained, before the passage of the workmen's compensation act and St. 1914, c. 553, when the plaintiff, while working for the defendant in a sand pit, was run into by a loaded sand car, the charge to the jury, having been warranted by the evidence, was held not open to exception because, in any event, the judge was careful not to impose his recollection of the evidence upon the jury. *Fratto* v. *Boston Elevated Railway*, 388.

In the same case instructions that the plaintiff could not recover if he was not in the exercise of due care were correct, because, if the plaintiff could have avoided the accident by stepping from the track as his companions did, his failure to do so was the direct cause of his injury; and, assuming

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that the motorman could have avoided the accident by stopping the car after he saw the plaintiff, his failure to do so, if negligent, would have been the negligence of a fellow servant. *Fratto* v. *Boston Elevated Railway*, 388.

At the trial of an action by an employee against his employer to recover for personal injuries caused by the breaking of a board on a staging upon which the plaintiff was working for the defendant who under contract with the person in control of a building was repairing a ceiling in the building, it appeared that the defendant had adopted for use a staging already erected and in proper condition, upon which later an unsuitable board was placed by an employee of the person in control of the building, and it was held that the evidence would not warrant a finding of negligence of the defendant. *Cutcliffe* v. *Harry D. McIntosh Co.* 423.

Upon the evidence at the trial of an action by a workman for personal injuries sustained, before the workmen's compensation act took effect, when the plaintiff was in the employ of the defendant and with other employees of the defendant was engaged in moving a hot water heater over a concrete floor in the defendant's factory, by reason of one of the legs of the heater coming out from the groove in which it was fitted and causing the heater to fall on the plaintiff, it was held that upon this evidence it could not have been ruled as matter of law that the danger connected with the work was so obvious that the plaintiff assumed the risk of injury and that, whether he was in the exercise of due care and whether he assumed the risk, were questions of fact for the jury. *Winston* v. *Converse Rubber Shoe Co.* 449.

In the case above described a man of experience in handling heaters, called by the plaintiff as a witness, testified as an expert, subject to the defendant's exception, that the method adopted in moving the heater was improper, and that a proper method would have been to remove the legs first and then by means of rollers and skids to slide or roll the heater along the floor, and it was held that the subject was a proper one for expert testimony and that the evidence was competent. *Ibid.*

In the same case it also was held that on the evidence above described the question, whether the defendant was negligent in the method adopted in doing the work and in failing to warn the plaintiff of the serious consequences that might follow if the legs suddenly were pulled away from the heater or slipped out of the grooves, was one of fact for the jury. *Ibid.*

Dangerous place.

Where a scrubwoman employed in a hotel was injured by falling when descending a properly lighted flight of stairs in the hotel building by reason of stepping on some "sort of slippery refuse . . . like grease," her employer is not liable for her injury, if there is nothing to show how or when the object on which the woman slipped came upon the stairs. *Zugbie* v. *J. R. Whipple Co.* 19.

Failure to warn.

Upon the evidence at the trial of an action for personal injuries received by a boy twelve years of age while employed as a helper on a pedler's wagon driven by the defendant, who was not a subscriber under the workmen's compensation act, and caused by the plaintiff's foot slipping from a board over the wheel when the defendant started the wagon without giving the

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plaintiff a customary warning, it was held that a verdict for the plaintiff was warranted. *Gayton* v. *Borsofsky*, 369.

Fellow servant.

At the trial of an action by an administrator against an express company, not a subscriber under the workmen's compensation act, for personal injuries and death of an employee of the defendant caused by a barrel falling upon him as he and a second man were loading it upon a truck, there was evidence that the barrel fell by reason of negligence of the second man and, it was held, the evidence warranted findings that the man whose negligence caused the injury and death of the plaintiff's intestate was at that time in the defendant's employ and was acting within the scope of his employment. *Schlehuber* v. *American Express Co.* 347.

Effect of workmen's compensation act.

Whether the provisions of St. 1911, c. 751, Part I, § 1, deprive a railroad corporation which is not a subscriber under the workmen's compensation act of the defences of contributory negligence and assumption of risk in an action brought against it under St. 1906, c. 463, Part I, § 63, as amended by St. 1907, c. 392, and St. 1912, c. 354, for causing the death of one of its employees, here was mentioned as a question which it was not necessary to decide in the present case. *Hix* v. *New York Central & Hudson River Railroad*, 309.

Street Railway.

Person on highway.

Before the passage of St. 1915, c. 87, any person travelling on a highway in an unregistered motor vehicle was a trespasser upon the highway and, if he was injured by a collision of the motor vehicle with a street railway car, he could hold the street railway corporation liable for his injuries only by showing that the collision was caused by the wilful or wanton conduct of its motorman or of some other of its agents. *Wentzell* v. *Boston Elevated Railway*, 275.

Conduct of a motorman operating a street railway car in a city street and running into a motor car, which, although it was evidence of negligence was not evidence of wanton or reckless misconduct on the part of the motorman which would make the street railway corporation liable to a trespasser on the highway in the motor car injured by the collision. *Ibid.*

On the evidence at the trial of an action against a corporation operating a street railway for personal injuries sustained (when St. 1914, c. 553, was in force) by being struck by the overhang of a car of the defendant from which the plaintiff, having received a transfer check, just had alighted to pass to another car, as the car turned at a right angle by means of a curve to go into a car barn at the end of its trip, it was held that, with the presumption created by the statute, a finding was warranted that the plaintiff was not negligent. *Niles* v. *Boston Elevated Railway*, 316.

It further was held, on the evidence at the trial of the action above described, that, although the plaintiff under the decision reported in 225 Mass. 570, was not a passenger, it was a question for the jury whether the conductor was negligent in starting the car, while the plaintiff was in such a perilous position and before she had an opportunity to reach a place of safety, with-

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out warning the plaintiff of the danger unappreciated by her to which she was exposed. *Niles* v. *Boston Elevated Railway*, 316.

In an action against a street railway company for personal injuries received by a child two and one half years of age, it was assumed that St. 1914, c. 553, was not applicable. *Sughrue* v. *Bay State Street Railway*, 363.

In an action against a street railway company for personal injuries to a child whose mother had left her in the custody of her older sister upon a sea beach near the street railway line, it was held that a finding was warranted that the motorman was negligent. *Ibid.*

On the evidence at the trial of an action by an administrator against a street railway corporation under St. 1906, c. 463, Part I, § 63, as amended by St. 1907, c. 392, for causing the death of the plaintiff's intestate after he had alighted from a car of the defendant by his being struck and instantly killed by another car of the defendant coming on a parallel track from the opposite direction, it was held that, although, if the accident had happened before the passage of St. 1914, c. 553, there would have been no evidence to go to the jury on this issue, yet, with the presumption created by the statute and the burden placed on the defendant to prove contributory negligence, it could not be ruled as matter of law that the negligence of the intestate contributed to his death, and the question of his negligence was for the jury. *Mercier* v. *Union Street Railway*, 397.

In the case above described it also was held that it was no evidence of negligence on the part of the conductor of the car from which the plaintiff's intestate had alighted that his warning to the passengers was confined to the car following and did not refer to the car coming on the other track, he having given no assurance of safety from that source of danger. *Ibid.*

In the same case it was pointed out that the intestate had ceased to be a passenger of the defendant when he had alighted from the car. *Ibid.*

Upon evidence as to the conduct of a motorman operating an electric street railway car on a country road on a dark night and approaching a crossing leading to some camps when he was so blinded by the lights of motor cars on the highway that he could not see clearly, it was held that it could not be ruled as a matter of law that it was not negligent for him to proceed under the circumstances to run over the crossing at the rate of twenty miles an hour after shutting off his headlight. *Ibid.*

Exclusion, at the trial of the case above described, of a question asked by the plaintiff in cross-examination of one of the passengers on the car that struck the intestate, "Don't you know that the usual speed there is forty miles an hour?" was held to have been within the discretion of the presiding judge, which appeared to have been exercised wisely. *Ibid.*

Where, at the same trial, there was evidence that when the accident occurred the car from which the plaintiff's intestate had alighted had started again and there was no evidence that that car was stationary at the time it was passed by the car that struck the intestate, it was held to be proper for the judge to exclude evidence of a rule of the defendant governing the conduct of motormen "passing standing cars." *Ibid.*

Upon the evidence at the trial of an action by the administrator of the estate of a woman against a street railway company for personal injuries suffered and death caused before the passage of St. 1914, c. 553, it appeared that the plaintiff's intestate was thrown from a carriage upon a public street in

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a city because the horse drawing the carriage, driven by her husband, fell into a hole in the street between street car rails which the defendant had undertaken to guard, and it was held that findings were warranted that both the husband and the wife were in the exercise of due care. *Charles* v. *Boston Elevated Railway*, 536.

If a city makes an excavation between the rails of a street car track and the street railway corporation undertakes to guard the hole and to prevent travellers from falling into it, the assumption of that duty is not an act by the corporation *ultra vires*. *Ibid.*

If, owing to negligence of the street railway company in performing the duty thus assumed by it, the death of a person is caused, recovery for such causing of death is not limited to the $1,000 allowed by R. L. c. 51, § 17, in an action against a municipality for loss of life caused by a defect in a highway. *Ibid.*

Instructions in the charge of the judge at the trial of an action for causing death relating to the question, whether the death was caused by the negligence of the defendant, were held not to be fairly susceptible of the construction that there could be recovery even though confinement to bed and consequent weakness were not the result of the accident or their proximate cause, but were held to mean that there could be no recovery except for consequences flowing from the fall as their operative cause, which was a correct statement of the law. *Ibid.*

Railroad.

Person at station.

In an action by a carrier of mail who, while engaged in the performance of his duties upon a cinder walk between tracks at a railroad station, was struck by a train which customarily waited outside the station at that time, it was held that findings were warranted that the plaintiff was in the exercise of due care and that the engineer of the train was negligent. *French* v. *Boston & Maine Railroad*, 163.

The plaintiff in the action above described was entitled to rely to a certain extent upon a custom, which could have been found to exist and of which he had knowledge, that the train from the west under the circumstances should wait beyond the switch until the train upon the siding had discharged mail, express matter and passengers and until those obliged to cross the main track had had an opportunity to reach a place of safety. *Ibid.*

It would not have been proper in the action above described to have ruled as a matter of law that the plaintiff was negligent in not having looked a second time toward the west in travelling the distance of fifteen or twenty feet from the west bound train to the place where he was injured. *Ibid.*

Grade crossing.

The fact that a railroad corporation, without being ordered so to do by the railroad commissioners or the public service commission under St. 1906, c. 463, Part II, § 151, voluntarily assumed the duty of maintaining a bell operated by an electrical appliance to warn the public against the danger of cars and engines approaching a grade crossing of the railroad with a highway, does not warrant an inference that it also assumed the duty of

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so warning the public against the danger of collision with a car standing still on the track at the crossing at night, or that the mechanism was intended for that purpose. *McGlauflin* v. *Boston & Maine Railroad*, 431.

In actions by the driver of and a passenger for hire in a motor car which in the night time collided with a car of a train so standing across a highway, where it appeared that the electric bell was not ringing to warn the plaintiffs as they approached and that the time that the train had been so standing was not more than five minutes, there is no evidence of negligence of the defendant. *Ibid.*

Motor Vehicle.

On the evidence at the trial of an action against the owner of a motor car by a woman for personal injuries received after the passage of St. 1914, c. 553, as she was about to cross a street much used by motor cars, it was held that the plaintiff was entitled to go to the jury upon the question of her due care with the burden upon the defendant affirmatively to prove contributory negligence. *Chaplin* v. *Brookline Taxi Co.* 155.

On the evidence at the trial of four actions of tort against a street railway corporation for personal injuries sustained after the enactment of St. 1914, c. 553, by being run into by an electric street railway car of the defendant when the plaintiffs were travelling in a motor butcher cart driven by one of them, it was held that the only reasonable conclusion was that the negligent conduct of each of the plaintiffs helped to bring on the accident, so that a verdict rightly was ordered for the defendant in each of the cases. *Pigeon* v. *Massachusetts Northeastern Street Railway*, 392.

In the cases above described it was held that, although the absence of an operating license was some evidence of negligence on the part of this plaintiff in operating the car, it was not conclusive and did not warrant the ordering of a verdict for the defendant as against that plaintiff, and, in deciding on other evidence that all the plaintiffs were negligent as matter of law, this court did not consider as an element the absence of an operating license. *Ibid.*

In Use of Electricity.

Upon the evidence at the trial of an action against a street railway corporation by an experienced lineman for personal injuries sustained in the year 1907 when in the defendant's employ, by falling from a pole by reason of coming in contact with the defendant's telephone wires charged with a dangerous current of electricity passed to them from high tension wires maintained by the defendant on another cross arm, it was held that there was no evidence of negligence for which the defendant was liable, it being equally probable that the defendant was not at fault or that the dangerous condition was caused by a fellow servant of the plaintiff for whose negligence the defendant was not legally accountable to the plaintiff. *Murphy* v. *Old Colony Street Railway*, 333.

In the case above described it was said that, there being no evidence to show negligence of the defendant at common law or under the employers' liability act, it had become unnecessary to consider the question of the due care of the plaintiff in failing to use a safety belt with which he was provided or other questions that had been raised at the trial. *Ibid.*

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In Use of Highway.

On the evidence at the trial of an action against a corporation operating a street railway for personal injuries sustained (when St. 1914, c. 553, was in force) by being struck by the overhang of a car of the defendant from which the plaintiff, having received a transfer check, just had alighted to pass to another car, as the car turned at a right angle by means of a curve to go into a car barn at the end of its trip, it was held that, with the presumption created by the statute, a finding was warranted that the plaintiff was not negligent. *Niles* v. *Boston Elevated Railway*, 316.

It further was held, on the evidence at the trial of the action above described, that, although the plaintiff under the decision reported in 225 Mass. 570, was not a passenger, it was a question for the jury whether the conductor was negligent in starting the car, while the plaintiff was in such a perilous position and before she had an opportunity to reach a place of safety, without warning the plaintiff of the danger unappreciated by her to which she was exposed. *Ibid.*

On the evidence at the trial of an action against the owner of a motor car by a woman for personal injuries received after the passage of St. 1914, c. 553, as she was about to cross a street much used by motor cars, it was held that the plaintiff was entitled to go to the jury upon the question of her due care with the burden upon the defendant affirmatively to prove contributory negligence. *Chaplin* v. *Brookline Taxi Co.* 155.

It cannot be ruled as matter of law that a child six years of age is too young to be alone and unattended upon a highway in a city and to pass from one side of a street to the other while on the way to and from school. *Miller* v. *Flash Chemical Co.* 419.

In an action by a girl against a corporation to recover for personal injuries received by her when six years of age by being run into by a motor vehicle as she was crossing a street in a city on the way home from school after she had slipped away from a child in whose charge she had been put, the question, whether the plaintiff was of an age capable of exercising due care for her own safety, is for the jury. *Ibid.*

The mere fact, that the plaintiff, in the action above described, "never went alone to and from school but always was accompanied by some older person," does not conclusively establish the fact that the plaintiff was not capable of exercising due care for her own safety. *Ibid.*

On the evidence at the trial of the action above described, it was held that the question, whether the plaintiff exercised that degree of care which under the circumstances she ordinarily would be expected to exercise, was for the jury. *Ibid.*

Upon the evidence at the trial of an action by the administrator of the estate of a woman against a street railway company for personal injuries suffered and death caused before the passage of St. 1914, c. 553, it appeared that the plaintiff's intestate was thrown from a carriage upon a public street in a city because the horse drawing the carriage, driven by her husband, fell into a hole in the street between street car rails which the defendant had undertaken to guard, and it was held that findings were warranted that both the husband and the wife were in the exercise of due care. *Charles* v. *Boston Elevated Railway*, 536.

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Of One Controlling Real Estate.

Where a scrubwoman employed in a hotel was injured by falling when descending a properly lighted flight of stairs in the hotel building by reason of stepping on some "sort of slippery refuse . . . like grease," her employer is not liable for her injury, if there is nothing to show how or when the object on which the woman slipped came upon the stairs. *Zugbie* v. *J. R. Whipple Co.* 19.

Where a person is injured by ice falling upon him due to a defective condition of a building and dies within six days without notice thereof having been given in accordance with Sts. 1908, c. 305; 1913, c. 324, in his behalf to the person responsible for the condition of the premises resulting in the injury, a notice given five days after the death of the person so injured by an attorney at law acting on behalf of one who more than a month later was appointed administrator of the estate of the person so injured does not satisfy the requirements of the statute, even if the attorney's act is ratified by the administrator after his appointment. *O'Neil* v. *Squire*, 294.

On the evidence at the trial of an action against one in control of a building for personal injuries received by an employee of a contractor who was repairing a ceiling and who had adopted for his uses a staging built by the defendant, which then was in good condition but upon which an employee of the defendant afterwards laid a board, which was not shown to be intended to be used as a part of the staging, but the breaking of which caused the plaintiff's injuries, it was held that a finding for the plaintiff was not warranted. *Cutcliffe* v. *Harry D. McIntosh Co.* 423.

Further evidence in the action above described, that an employee of the defendant assured the plaintiff that the staging was safe, in the absence of evidence that he had authority so to do, was held not to warrant a finding for the plaintiff. *Ibid.*

At the trial of an action by a woman against the owner of a building in a city for personal injuries alleged to have been received when a piece of ice fell from the building upon the plaintiff, the plaintiff testified in direct examination that the ice fell from the building, but later in her testimony made statements conflicting with this, and it was held that it was for the jury to choose between these contradictory statements, and that a finding was warranted that the ice fell from the roof of the defendant's building. *Connors* v. *Richards*, 436.

In the foregoing action it was admitted that, although parts of the defendant's building were rented to tenants, the roof was under the defendant's care and control, and it was held that, if the jury found that ice of the size described by the plaintiff came from the roof and struck the plaintiff, they would be warranted in finding for the plaintiff. *Ibid.*

Upon the evidence at the trial of an action for personal injuries from being struck on the head by a piece of ice falling from a building of the defendant, as to the circumstances under which the plaintiff accepted $5 and signed a release, it was held that the jury were warranted in finding that the defendant's agent made representations that the release referred only to damage to the plaintiff's muff and that they were binding upon the defendants, and that the release therefore did not bar the action. *Ibid.*

Upon the evidence at the trial of an action against the owner of an apartment house by the occupant of an apartment therein for personal injuries sus-

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tained by falling on the outside steps of the house, controlled by the defendant and used in common by all the tenants, by reason of snow or ice negligently allowed to accumulate and remain thereon, where it appeared that the defendant had taken upon himself the duty of cleaning the platform and steps from ice and snow, it was held that the plaintiff was entitled to go to the jury. *Erickson* v. *Buckley*, 467.

A railroad corporation which has made contracts with various persons for doing different parts of the work of constructing a steel framed building upon its land for its uses, the work to be done by the contractors exclusively although under the direction and control and to the satisfaction of the chief engineer of the railroad corporation, whose decision as to the true construction and meaning of the drawings and specifications was to be final, was held under the circumstances not to be liable in an action against it for personal injuries suffered by an employee of one of the contractors and due to a fall while he was assisting in straightening a truss which an inspector for the railroad corporation had determined was not placed in accordance with the drawings and specifications. *Morrissey* v. *Boston & Maine Railroad*, 171.

In such an action, the mere facts, that the inspector of the defendant, in reply to an inquiry by the foreman under whom the plaintiff worked as to where spikes could be obtained to use in carrying out the straightening of the truss, replied, "There is lots of them up on the roof," and that the plaintiff thereupon was ordered by the foreman to go to the roof for the spikes, whence he was returning when he fell from the ladder, will not warrant a finding that the defendant was engaged in any way in the work being done when the plaintiff was injured. *Ibid.*

If one of the contractors, not the plaintiff's employer, in the construction of the building above described, had placed a ladder against the side of the building, which the plaintiff used in going to the roof when the foreman ordered him to do so, such contractor cannot be said to have invited the plaintiff to use the ladder for his purposes, and, in an action by the plaintiff against such contractor, the plaintiff must be treated at best as a licensee of the defendant. *Ibid.*

In an action by the same plaintiff against such contractor for the personal injuries above described, it was held that the defendant owed to the plaintiff no duty as to an unfastened purlin, the turning of which caused his fall, and that the purlin in the condition and position in which it was did not constitute a trap. *Ibid.*

In Hoisting Lumber.

In an action by a carpenter against his employer for personal injuries sustained before the workmen's compensation act took effect when the plaintiff was at work piling sawed hard pine lumber by means of an engine, a derrick and a pair of tongs and caused by one of the timbers slipping from the tongs due to their being unsuitable and unsafe for hoisting such timbers, it was held not to be a defence that the tongs supplied by the defendant were in common use for the purpose for which the defendant used them and that a ruling setting aside a verdict for the plaintiff on that ground was wrong. *Wilson* v. *Alexander*, 242.

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Defective Staging.

At the trial of an action by an employee against his employer to recover for personal injuries caused by the breaking of a board on a staging upon which the plaintiff was working for the defendant who under contract with the person in control of a building was repairing a ceiling in the building, it appeared that the defendant had adopted for use a staging already erected and in proper condition, upon which later an unsuitable board was placed by an employee of the person in control of the building, and it was held that the evidence would not warrant a finding of negligence of the defendant. *Cutcliffe* v. *Harry D. McIntosh Co.* 423.

The plaintiff in the action above described also brought an action against the person in control of the building for the same injuries, on the evidence at the trial of which, there being no evidence that the board which broke was placed on the staging by the defendant or by any one for him to be used as a part of the staging, it was held that a finding for the plaintiff would not be warranted. *Ibid.*

Further evidence in the action above described, that an employee of the defendant assured the plaintiff that the staging was safe, in the absence of evidence that he had authority so to do, was held not to warrant a finding for the plaintiff. *Ibid.*

Wrecking Operations.

Upon the evidence at the trial of an action by an employee of a wrecking company against the owner of a mill for personal injuries, it was held that findings were warranted, either that a chisel left upon a plank between two upright boilers fell with the plank and struck the plaintiff, or that a workman of the owner as he ascended the ladder dropped a chisel upon the plaintiff; that, whichever was the cause determined upon by the jury, a further finding was warranted that the plaintiff's injuries were due to negligence for which the defendant might be found to be responsible. *Heuser* v. *Tileston & Hollingsworth Co.* 299.

A finding of the jury for the plaintiff at the trial of the action above described could not be said as a matter of law to be based upon conjecture, but was warranted by reasonable inferences from facts which might have been found to exist. *Ibid.*

Where a wrecking company under contract with a mill owner is tearing away brick work around upright boilers while workmen of the mill owner are taking down the boilers, the mill owner owes to the employees of the company the same duty not to injure them that he owes to his own workmen. *Ibid.*

Testimony, at the trial of the action above described, that a day or two before the accident a workman of the defendant was seen to come up half way through the manhole in the top of the boiler, pick up something and go back again, was admissible as having some tendency to show that something was on a plank between two boilers and, in connection with other testimony of the same witness that he had seen tools on the plank, such testimony warranted an inference that the plank was used by workmen of the defendant to place tools upon. *Ibid.*

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Customer Locked in Refrigerator.

If one going to buy fish from a wholesale dealer on a fish pier is locked in the fish dealer's refrigerator through the negligence of one of the dealer's servants acting within the scope of his authority and thereby suffers injury, he has a cause of action against the fish dealer. *Sawyer* v. *Arnold & Winsor Co.* 439.

Of Merchant.

In the absence of negligence, a retail dealer in selling a commodity not inherently harmful or dangerous is not liable in tort for personal injury resulting from its condition. *Barrango* v. *Hinckley Rendering Co.* 93.

The mere fact, that a member of the family of the customer to whom the bar of soap was delivered by the driver, as above described, was injured by a needle embedded in the soap, is not evidence of negligence of the driver or of his employer. *Ibid.*

Testimony of a driver of a team for a rendering plant, who in behalf of his employer collected soap grease, giving in payment therefor soap which it did not manufacture but acquired from others in the usual course of its business, that sometimes a nail was found in bars of the soap and that he examined them before delivering them to purchasers, is not evidence tending to show that the presence of a needle in a bar of soap given by the driver to a customer was due to negligence of the driver or of his employer. *Ibid.*

In a Mill or Factory.

Upon the evidence at the trial of an action by a workman for personal injuries sustained, before the workmen's compensation act took effect, when the plaintiff was in the employ of the defendant and with other employees of the defendant was engaged in moving a hot water heater over a concrete floor in the defendant's factory, by reason of one of the legs of the heater coming out from the groove in which it was fitted and causing the heater to fall on the plaintiff, it was held that upon this evidence it could not have been ruled as matter of law that the danger connected with the work was so obvious that the plaintiff assumed the risk of injury and that, whether he was in the exercise of due care and whether he assumed the risk, were questions for the jury. *Winston* v. *Converse Rubber Shoe Co.* 449.

In the case above described a man of experience in handling heaters, called by the plaintiff as a witness, testified as an expert, subject to the defendant's exception, that the method adopted in moving the heater was improper, and that a proper method would have been to remove the legs first and then by means of rollers and skids to slide or roll the heater along the floor, and it was held that the subject was a proper one for expert testimony and that the evidence was competent. *Ibid.*

In the same case it also was held that on the evidence above described the question, whether the defendant was negligent in the method adopted in doing the work and failing to warn the plaintiff of the serious consequences that might follow if the legs suddenly were pulled away from the heater or slipped out of the grooves, was one of fact for the jury. *Ibid.*

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Of Physician.

In an action by a married woman against a physician for alleged negligent professional treatment of the plaintiff after she had been delivered of a child, it was held that there was evidence to support a specification that one shoulder of the plaintiff was fractured and her other shoulder dislocated by holding her wrists under the direction of the defendant to restrain her while she was having convulsions. *Connor* v. *O'Donnell*, 39.

In the same case it also was held that there was evidence to support another specification that the defendant was unskilful and negligent in failing to discover the condition of the plaintiff's shoulders as described above and causing her great pain by directing that they should be manipulated. *Ibid.*

Where, at the trial of an action of tort against a physician for injuries alleged to have resulted from negligence of the defendant in treating the plaintiff's eyes shortly after his birth, there is conflicting evidence, both on the question, whether the physician gave proper treatment within a few hours after the birth, and on the question whether he gave proper treatment when the symptoms of disease became apparent six days later, it is improper for the trial judge to rule that the jury should find for the defendant if they found that he was not negligent in the treatment he gave within the few hours after the birth. *Medlin* v. *Bloom*, 201.

On the evidence at the trial of the action above described, it was held that it was proper for the trial judge to rule that "The fact that the defendant did not answer a call for treatment for the plaintiff promptly does not constitute negligence." *Ibid.*

It was not evidence of negligence on the part of the defendant in the action above described that he did not order nor advise the removal of the plaintiff to a hospital immediately upon discovering his affliction. *Ibid.*

At the trial of the action above described evidence was not admissible as to the circumstances and environments in the plaintiff's home, nor as to whether treatment in a hospital then would have been proper or more efficient and desirable. *Ibid.*

Evidence, which, it was held, tended to show a violation by a physician of R. L. c. 75, § 50, as amended by St. 1905, c. 251, § 2, requiring a notice from the physician under circumstances described in the statutes "immediately," and which therefore was evidence of his negligence, the evident purpose of the statutory requirement being to make it possible for immediate and scientific treatment to be given and blindness to be prevented. *Ibid.*

In Raising Ship.

In an action by the owner of a motor boat against a lighter company for personal injuries caused by the giving way of apparatus of the defendant, which was being used to raise the stern of a tug owned by a third party while the plaintiff was beneath the stern with his boat carrying the tug's engineer in order that the engineer might recover a hawser which had become entangled in the propeller, it is unnecessary for the plaintiff, in order to show that he rightfully was there, to show more than that he undertook to assist at the request of the captain of the tug. *Collins* v. *Splane*, 281.

Upon a review of the evidence at the trial of the action above described, it was held that there was evidence warranting findings that employees of

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the defendant acted within the scope of their authority in undertaking at the request of the captain of the tug to hoist the stern of the tug for the purpose above described, and that, if their action in that regard originally was unauthorized, it afterwards was ratified by the company's officers, who, with full knowledge of the circumstances, presented and received payment of a bill for the work thus performed. *Collins* v. *Splaine*, 281.

In the action above described there was evidence which warranted findings that the defendant's employees in hoisting the tug used a hook attached to the block of a tackle holding a sling which had been passed under the stern of the tug and which was so worn, chafed and frayed that, when subjected to the strain necessary for the work, it gave way and the tug's stern descended upon the plaintiff, and that this condition could have been ascertained and remedied by the exercise of reasonable diligence on the part of the defendant's employees, and it was held that a verdict for the plaintiff was warranted. *Ibid.*

It appeared that the captain of the tug boat, while on his way to the wharf of a lighter company to procure assistance, within the scope of his authority hailed the plaintiff and made a contract with him to take aboard the tug's engineer for the purposes above described, and that the plaintiff was injured because a part of the apparatus negligently used by the lighter company was defective; and it was held that the owner of the tug was under no liability to the plaintiff for injuries thus received. *Ibid.*

Unloading Ship.

On the evidence at the trial of an action for personal injuries and death of a longshoreman, who, when assisting in unloading a ship, fell because a temporary platform which he had been accustomed to use was not in place because the superintendent had caused it to be removed, it was held that there was nothing to show negligence on the part of the superintendent, who had no reason to think that the longshoreman expected to use the platform to stand upon when it was apparent that it had been removed, and that it was not the duty of the superintendent to warn an experienced longshoreman of a danger which was plainly visible. *Kenneally* v. *Oceanic Steam Navigation Co. Ltd.* 446.

In the same case it was held that the platforms were not a part of the ways, works or machinery of the defendant. *Ibid.*

In Care of Perishable Goods.

Where the owner and consignee of certain fish agreed with a carrier to make, and did make, an arrangement to replenish ice in a refrigerator car, the bill of lading containing no provision on the subject, and the fish were spoiled by reason of the consignee's own failure to provide sufficient ice to keep them in good condition after their arrival in a freight yard of the carrier, the consignee cannot hold the carrier liable for his loss thus sustained. *Emery & Co. Inc.* v. *Boston & Maine Railroad*, 463.

Circumstances under which the fish failed to be iced because a company whom the owner engaged to attend to it did not arrive at the freight yard until after closing hour, so that the fish spoiled, were held not to show negligence of the carrier. *Ibid.*

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In a Sand Pit.

At the trial of an action against a street railway corporation for personal injuries sustained, before the passage of the workmen's compensation act and St. 1914, c. 553, when the plaintiff, while working for the defendant in a sand pit, was run into by a loaded sand car, the charge to the jury, having been warranted by the evidence, was held not open to exception because, in any event, the judge was careful not to impose his recollection of the evidence upon the jury. *Fratto* v. *Boston Elevated Railway*, 388.

In the same case instructions that the plaintiff could not recover if he was not in the exercise of due care were correct because, if the plaintiff could have avoided the accident by stepping from the track as his companions did, his failure to do so was the direct cause of his injury; and, assuming that the motorman could have avoided the accident by stopping the car after he saw the plaintiff, his failure to do so, if negligent, would have been the negligence of a fellow servant. *Ibid.*

In Loading Truck.

At the trial of an action by an administrator against an express company for personal injuries and death of an employee of the defendant caused by a barrel falling upon him as he and a second man were loading it upon a truck, there was evidence that the barrel fell by reason of negligence of the second man and, it was held, the evidence warranted findings that the man whose negligence caused the injury and death of the plaintiff's intestate was at that time in the defendant's employ and acting within the scope of his employment. *Schlehuber* v. *American Express Co.* 347.

In Use of Firearms.

Act of a porter in the employ of an express company at a railroad station in drawing a loaded revolver from its holster, when he is resting at the stand of a bootblack, at the request of one of two bootblacks, was held not to have been in the course of his employment, so that a bootblack who was shot in the leg when the revolver was accidentally discharged could not maintain an action against the express company employing the porter for his injuries thus sustained. *Lamanna* v. *American Express Co.* 564.

At Railroad Station.

Action by a carrier of mail for personal injuries caused by his being struck by a passing train as he was engaged in the performance of his duties upon a cinder walk between tracks at a railroad station. *French* v. *Boston & Maine Railroad*, 163.

Causing Death.

Where a person is injured by ice falling upon him due to a defective condition of a building and dies within six days without notice thereof having been given in accordance with Sts. 1908, c. 305; 1913, c. 324, in his behalf to the person responsible for the condition of the premises resulting in the injury, a notice given five days after the death of the person so injured by an attorney at law acting on behalf of one who more than a month later was

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appointed administrator of the estate of the person so injured does not satisfy the requirements of the statute, even if the attorney's act is ratified by the administrator after his appointment. *O'Neil* v. *Squire*, 294.

Evidence of the maintenance of a public nuisance in tide water in violation of the express terms of a penal statute and dangerous in fact to those members of the public lawfully navigating in the neighborhood is evidence of negligence under St. 1907, c. 375. *Fuller* v. *Andrew*, 139.

In the case above described it was said that, in addition to the fact of the maintenance of the public nuisance, there also was evidence in regard to the condition of weakness and want of repair into which the pier had been suffered to fall which tended to show lack of care. *Ibid.*

A pier extending into tide water, which was an obstruction to navigation and was built without obtaining any license from the harbor and land commissioners as required by R. L. c. 96, § 17, and had become the property of the owner of the land from which it ran, was held under the circumstances to be a public nuisance, making the landowner liable under St. 1907, c. 375, for the death of a person in the exercise of due care caused by such obstruction to navigation. *Ibid.*

In an action against the landowner for such death, it appeared that the portion of the structure which fell on the boat containing the plaintiff's intestate was supported by piles driven into the bed of the harbor below low water mark, where the soil belonged to the Commonwealth, and it was held that the whole of the pier must be treated as maintained by the defendant, upon whose land one end of it rested, it having been designed for use solely in connection with that land. *Ibid.*

Whether the provisions of St. 1911, c. 751, Part I, § 1, deprive a railroad corporation which is not a subscriber under the workmen's compensation act of the defences of contributory negligence and assumption of risk in an action brought against it under St. 1906, c. 463, Part I, § 63, as amended by St. 1907, c. 392, and St. 1912, c. 354, for causing the death of one of its employees, here was mentioned as a question which it was not necessary to decide in the present case. *Hix* v. *New York Central & Hudson River Railroad*, 309.

Detailed statement of the changes wrought by the provisions of St. 1914, c. 553, § 1, that "In all actions, civil or criminal, to recover damages for injuries to the person or property or for causing the death of a person, the person injured or killed shall be presumed to have been in the exercise of due care," in the rules of law previously in force in actions for injury to person or property through negligence and in actions for the negligent causing of death. *Duggan* v. *Bay State Street Railway*, 370.

Effect of the further provision of the same section of the statute, that contributory negligence on the part of a person, who has been so injured or killed or whose property has been damaged, "shall be an affirmative defence to be set up in the answer of, and proved by the defendant." *Ibid.*

St. 1914, c. 553, § 1, does not change the substantive law of negligence. The tribunal hearing an action of tort for personal injuries or death alleged to have been caused by negligence still must be satisfied on all the evidence that the plaintiff or the decedent was in the exercise of due care and did not by his own acts of omission or commission help to produce his injury or death, and that the defendant was negligent. *Ibid.*

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The inference of due care on the part of the plaintiff or decedent in the actions described in the above statute, which by the statute is made a presumption of fact, is not arbitrary nor irrational. *Duggan* v. *Bay State Street Railway*, 370.

St. 1914, c. 553, as above construed, does not contravene any provision of the Constitution of the Commonwealth or of the Fourteenth Amendment to the Federal Constitution. *Ibid.*

The provisions of St. 1914, c. 553, § 1, do not require necessarily that in every action therein described, when tried before a jury, the due care of the person who was injured or damaged or whose death was caused becomes a question of fact which must be submitted to the jury. *Ibid.*

Where from facts, which are undisputed or indisputable or are shown by evidence by which the plaintiff is bound, only one rational inference can be drawn and that is an inference of contributory negligence or want of due care, then the question of due care or contributory negligence is one of law for the court and a verdict for the defendant should be ordered. *Ibid.*

On the evidence at the trial of an action by an administrator against a street railway corporation under St. 1906, c. 463, Part I, § 63, as amended by St. 1907, c. 392, for causing the death of the plaintiff's intestate after he had alighted from a car of the defendant by his being struck and instantly killed by another car of the defendant coming on a parallel track from the opposite direction, it was held that, although, if the accident had happened before the passage of St. 1914, c. 553, there would have been no evidence to go to the jury on this issue, yet, with the presumption created by the statute and the burden placed on the defendant to prove contributory negligence, it could not be ruled as matter of law that the negligence of the intestate contributed to his death, and the question of his negligence was for the jury. *Mercier* v. *Union Street Railway*, 397.

In the case above described it was said that it was not necessary in that case to determine whether St. 1914, c. 553, § 2, made any change in the degree of care on the part of the person killed which is required by the statutes imposing penalties causing death. *Ibid.*

Upon evidence as to the conduct of a motorman operating an electric street railway car on a country road on a dark night and approaching a crossing leading to some camps when he was so blinded by the lights of motor cars on the highway that he could not see clearly, it was held that it could not be ruled as a matter of law that it was not negligent for him to proceed under the circumstances to run over the crossing at the rate of twenty miles an hour after shutting off his headlight. *Ibid.*

In the case above described it also was held that it was no evidence of negligence on the part of the conductor of the car from which the plaintiff's intestate had alighted that his warning to the passengers was confined to the car following and did not refer to the car coming on the other track, he having given no assurance of safety from that source of danger. *Ibid.*

Upon the evidence at the trial of an action by the administrator of the estate of a woman against a street railway company for personal injuries suffered and death caused before the passage of St. 1914, c. 553, it appeared that the plaintiff's intestate was thrown from a carriage upon a public street

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in a city because the horse drawing the carriage, driven by her husband, fell into a hole in the street between street car rails which the defendant had undertaken to guard, and it was held that findings were warranted that both the husband and the wife were in the exercise of due care. *Charles* v. *Boston Elevated Railway*, 536.

If, owing to negligence of the street railway company in performing the duty thus assumed by it, the death of a person is caused, recovery for such causing of death is not limited to the $1,000 allowed by R. L. c. 51, § 17, in an action against a municipality for loss of life caused by a defect in a highway. *Ibid.*

Instructions in the charge of the judge at the trial of an action for causing death relating to the question, whether the death was caused by the negligence of the defendant, were held not to be fairly susceptible of the construction that there could be recovery even though confinement to bed and consequent weakness were not the result of the accident or their proximate cause, but were held to mean that there could be no recovery except for consequences flowing from the fall as their operative cause, which was a correct statement of the law. *Ibid.*

Wilful or Wanton Misconduct.

No degree of negligence can make one liable for an injury to a trespasser. To establish such liability it must be shown that the person who injured the trespasser was a wilful or wanton wrongdoer in causing the injury. *Wentzell* v. *Boston Elevated Railway*, 275.

An alleged wrongdoer acts wilfully or wantonly only when he inflicts an injury intentionally or is so utterly indifferent to the rights of others that he acts as if such rights did not exist. By BRALEY, J. *Ibid.*

Conduct of a motorman operating a street railway car in a city street and running into a motor car, which, although it was evidence of negligence, was not evidence of wanton or reckless misconduct on the part of the motorman which would make the street railway corporation liable to a trespasser on the highway in the motor car injured by the collision. *Ibid.*

As Defence to Action upon Policy of Fire Insurance.

Where, in an action upon a policy of fire insurance, it appeared that the buildings insured were destroyed by a fire which was communicated from a fire set more than fifty feet from the buildings by the insured, who had violated the provisions of St. 1911, c. 244, § 1, in failing to procure the permit required by that statute before starting the fire, it was held that it would have been improper to order a verdict for the defendant, there having been questions for the jury, whether the violation of the statute in failing to procure the permit was a negligent act of the insured which was a proximate cause of the loss, and, if so, whether the negligence was of such a character as to bar recovery on the policy. *Todd* v. *Traders & Mechanics Ins. Co.* 595.

Mere negligence on the part of one insured against loss by fire does not prevent recovery on the policy, it being one of the objects of insurance to protect the insured from loss due to carelessness. *Ibid.*

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Violation of Statute.

Evidence of the maintenance of a public nuisance in tide water in violation of the express terms of a penal statute and dangerous in fact to those members of the public lawfully navigating in the neighborhood is evidence of negligence under St. 1907, c. 375. *Fuller* v. *Andrew*, 139.

Violation by a physician of R. L. c. 75, § 50, as amended by St. 1905, c. 251, § 2, was held to have been evidence of negligence causing injury to the eyes of a new born child. *Medlin* v. *Bloom*, 201.

Where, in an action upon a policy of fire insurance, it appeared that the buildings insured were destroyed by a fire which was communicated from a fire set more than fifty feet from the buildings by the insured, who had violated the provisions of St. 1911, c. 244, § 1, in failing to procure the permit required by that statute before starting the fire, it was held that it would have been improper to order a verdict for the defendant, there having been questions for the jury, whether the violation of the statute in failing to procure the permit was a negligent act of the insured which was a proximate cause of the loss, and, if so, whether the negligence was of such a character as to bar recovery on the policy. *Todd* v. *Traders & Mechanics Ins. Co.* 595.

Violation of Rule.

Where, at the trial of an action for personal injuries and death caused by the plaintiff's intestate being run into by a street car of the defendant after he had left a car going in the opposite direction on an adjoining track, there was evidence that when the accident occurred the car from which the plaintiff's intestate had alighted had started again and there was no evidence that that car was stationary at the time it was passed by the car that struck the intestate, it was held to have been proper for the judge to exclude evidence of a rule of the defendant governing the conduct of motormen "passing standing cars." *Mercier* v. *Union Street Railway*, 397.

Slippery Object whose Presence is Unexplained.

Collection of cases of personal injuries from falls caused by slipping on objects whose presence was unexplained. *Zugbie* v. *J. R. Whipple Co.* 19.

Where a scrubwoman employed in a hotel was injured by falling when descending a properly lighted flight of stairs in the hotel building by reason of stepping on some "sort of slippery refuse . . . like grease," her employer is not liable for her injury, if there is nothing to show how or when the object on which the woman slipped came upon the stairs. *Ibid.*

Proximate Cause.

Question, whether negligence in violating St. 1911, c. 244, § 1, by failing to procure the permit therein required before starting a certain fire, was a proximate cause of the burning of certain buildings, was for the jury. *Todd* v. *Traders & Mechanics Ins. Co.* 595.

Instructions as to whether death was caused by negligence of the defendant were held to be correct. *Charles* v. *Boston Elevated Railway*, 536.

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Res ipsa loquitur.

The mere fact, that a member of the family of a customer to whom a bar of soap containing a needle embedded therein was delivered by the driver of a team for a rendering plant, was injured by the needle, is not evidence of negligence of the driver or of his employer. *Barrango* v. *Hinckley Rendering Co.* 93.

NEW TRIAL.

See that subtitle under PRACTICE, CIVIL.

NOTICE.

In a suit in equity under St. 1914, c. 464, by one who had recovered judgment against certain bridge builders for bodily injuries, to reach casualty insurance in a certain insurance company and apply it to the satisfaction of such judgment, it was held that a requirement of the insurance policy as to notice by the insured to the company had not been complied with by the insured, who had assumed from the fact that the plaintiff had gone back to his work and had made no complaint that his injury was a trifling one; and therefore, the policy having required immediate notice of the occurrence of an accident regardless of any claim for damages or the amount of damages sustained and such requirement being a reasonable one, the suit was dismissed. *McCarthy* v. *Rendle*, 35.

In the case above described it was pointed out that the fact, that the person injured had a reasonable and *bona fide* doubt as to the existence of any injury or any liability, could not deprive the insurer of its contractual right under the policy to have immediate notice of the occurrence of an accident regardless of any claim that might be founded on it. *Ibid.*

Distinction pointed out by RUGG, C. J., between a public and a private nuisance in regard to the requirement of a notice to abate the nuisance in order to create liability. *Fuller* v. *Andrew*, 139.

In a suit in equity by the trustees of a land trust against a trust company, seeking to impress with a trust funds deposited with the defendant by the plaintiffs' assistant treasurer, a dishonest agent, it was held under the circumstances that, as the defendant had no interest in the deposits and never had received any part of them for the payment of any debt to it, the defendant could not be charged with constructive notice of the fraudulent conduct of the depositor, and accordingly that there was no evidence that the defendant knew that the depositor intended to misappropriate the funds, and that the plaintiff was entitled to no relief against it. *Kendall* v. *Fidelity Trust Co.* 238.

A statement in a notice of a sale in foreclosure of a mortgage of real estate, that the premises would be sold "subject to the amount unpaid on a prior mortgage of record of $5,500 . . . and all unpaid taxes, liens and assessments," does not make the sale invalid by reason of the fact that the amount due on the prior mortgage at the time of the notice was $5,275. *Ananian* v. *Melkon*, 322.

Under St. 1908, c. 305, as amended by St. 1913, c. 324, a husband, who has incurred expenses by reason of personal injuries sustained by his wife resulting from snow or ice, is required to give the statutory notice in order to maintain an action for his loss thus sustained. *Erickson* v. *Buckley*, 467.

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A notice given by a wife under St. 1908, c. 305, as amended by St. 1913, c. 324, of personal injuries sustained by her resulting from snow or ice, which is confined by its terms to her claim for damages and was "given at her request and in her behalf. By her attorneys, . . ." is not a notice in behalf of her husband as the foundation of a claim by him for consequential damages arising from her injuries. *Erickson* v. *Buckley*, 467.

In actions for personal injuries and death resulting from snow and ice, see SNOW AND ICE.

NUISANCE.

Distinction pointed out by RUGG, C. J., between a public and a private nuisance in regard to the requirement of a notice to abate the nuisance in order to create liability. *Fuller* v. *Andrew*, 139.

Evidence of the maintenance of a public nuisance in tide water in violation of the express terms of a penal statute and dangerous in fact to those members of the public lawfully navigating in the neighborhood is evidence of negligence under St. 1907, c. 375. *Ibid.*

A pier extending into tide water, which was an obstruction to navigation and was built without obtaining any license from the harbor and land commissioners as required by R. L. c. 96, § 17, and had become the property of the owner of the land from which it ran, was held under the circumstances to be a public nuisance, making the landowner liable under St. 1907, c. 375, for the death of a person in the exercise of due care caused by such obstruction to navigation. *Ibid.*

In an action against the landowner for such death, it appeared that the portion of the structure which fell on the boat containing the plaintiff's intestate was supported by piles driven into the bed of the harbor below low water mark, where the soil belonged to the Commonwealth, and it was held that the whole of the pier must be treated as maintained by the defendant, upon whose land one end of it rested, it having been designed for use solely in connection with that land. *Ibid.*

In the case above described it was said that, in addition to the fact of the maintenance of the public nuisance, there also was evidence in regard to the condition of weakness and want of repair into which the pier had been suffered to fall which tended to show lack of care. *Ibid.*

OFFICER.

Statement in the return of the officer on an execution for costs was held to be some evidence of "avoidance or inability" under R. L. c. 173, § 39, which makes the indorser of a bill in equity liable to pay all costs which may be awarded against the plaintiff "in case of avoidance or inability of the plaintiff," and to warrant a special finding of the jury that the plaintiff in equity was unable to pay the amount of the execution for costs. *Bird* v. *Johnston*, 28.

PARENT AND CHILD.

On a petition under R. L. c. 162, § 13, to enter late an appeal from a decree of the Probate Court denying a petition to be appointed the administrator *de bonis non* of the estate of a certain intestate on the ground that the petitioner was the son and the only living heir of the intestate, the master having found, on evidence not reported, that the petitioner was not the son

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of the intestate, it was held that the petition was dismissed rightly. ***Phillips*** v. ***Phillips***, 14.

In an action against a street railway company for personal injuries received by a child two and one half years of age, it was assumed that St. 1914, c. 553, was not applicable. *Sughrue* v. *Bay State Street Railway*, 363.

In an action against a street railway company for personal injuries to a child whose mother had left her in the custody of her older sister upon a sea beach near the street railway line, it was held that findings were warranted that the mother was justified in leaving the child in the charge of her older sister, and that the sister in the performance of her duty as custodian did all that could be expected of an ordinarily prudent girl of her age. *Ibid.*

It cannot be ruled as matter of law that a child six years of age is too young to be alone and unattended upon a highway in a city and to pass from one side of a street to the other while on the way to and from school. *Miller* v. *Flash Chemical Co.* 419.

In an action by a girl against a corporation to recover for personal injuries received by her when six years of age by being run into by a motor vehicle as she was crossing a street in a city on the way home from school after she had slipped away from a child in whose charge she had been put, the question, whether the plaintiff was of an age capable of exercising due care for her own safety, is for the jury. *Ibid.*

The mere fact, that the plaintiff, in the action above described, "never went alone to and from school but always was accompanied by some older person," does not conclusively establish the fact that the plaintiff was not capable of exercising due care for her own safety. *Ibid.*

Where one of several sons, after the death of his father, acts in a confidential and advisory, but not strictly in a fiduciary, relation to his mother, who is the sole beneficiary of his father's will and as such has received property of considerable value, such relationship does not preclude business relations between him and his mother. *Parsons* v. *Parsons*, 544.

And, if the mother conveys to such son certain real estate which she received under his father's will and which the son forthwith improves by extensive building operations, and, after the death of the son, brings a bill in equity in which she alleges that the conveyance was made to the son for her benefit and seeks a reconveyance and accounting, while careful scrutiny is required under such circumstances to make sure that the transaction was fully understood by the mother as to its direct and remote bearings and was entered into by her with appreciation of its immediate effect and ultimate result and that there was no overreaching and that no unfair advantage was taken of her, when these elements are assured, the transaction stands on the same footing as other business transactions. *Ibid.*

Application of the foregoing rules which resulted in such a conveyance being held to be valid. *Ibid.*

PARTNERSHIP.

A bill in equity by one partner against his two copartners in conducting theatrical entertainments and moving picture exhibits in a building erected by them on certain land belonging to the three, subject to certain mortgages, for a partnership accounting, was upheld on demurrer as stating a ground for relief against the two defendants, although the allegations were vague and general. *Skolnick* v. *Greenburg*, 359.

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Where the bill above described joined another defendant, who was alleged to hold title to two undivided thirds of the real estate in trust for the two defendants alleged to be partners, but there was no allegation that the real estate was any part of the partnership assets legal or equitable, it was held that no case was set out connecting the third defendant with the partnership and that as to the third defendant the bill should be dismissed. *Skolnick* v. *Greenburg*, 359.

Real Estate Trust comprising Partnership.

See TRUST.

PAWNBROKER.

The interest received by a pawnbroker in the course of his business lawfully may be taxed at the rate of six per cent under St. 1916, c. 269, § 2 (a), imposing a tax at that rate on income from "money at interest" and is not taxable under § 5 (b) of the same chapter, imposing a tax at the rate of one and a half per cent on income "derived from professions, employments, trade or business" and providing that "Interest and dividends taxable under section two of this act shall not be taxed under this section." *Goldman* v. *Tax Commissioner*, 554.

PAYMENT.

In an action for the price of goods sold and delivered, in which the statute of limitations was pleaded, there were two accounts, the last item on the old account being more than six years before the date of the writ, and it was held that the plaintiff had no right to apply an accidental over-payment on the new account to the old account and thus create a payment which would take that account out of the statute of limitations by which otherwise it was barred. *Spinney* v. *Freeman*, 356.

PERPETUITIES, RULE AGAINST.

Rule for the determination of the beginning of the period of valid executory limitation as determined by the rule against perpetuities for estates made by the exercise of a general power of testamentary appointment over a fund given by will to a person who during his life is given only the income of the fund without power of appointment by deed. *Minot* v. *Paine*, 514.

Application of such rule to an appointment by will to trustees after the death of the testator's husband "to hold the same for the benefit of my children," each to receive a share of the income "until he shall have attained the age of twenty five years, and on his attaining the age of twenty five years, to transfer and convey his equal and proportionate share of the trust fund to such son in fee, free of these trusts," such appointment under the circumstances being declared to be valid. *Ibid.*

Further application of the rule to a provision in the same will for a fourth son, that, after the death of his father, his proportionate share of the fund should be set apart as a separate fund, of which he should receive the income during his life, and that at his death the income of an amount named should be paid to his adopted daughter, named, and that the remainder of his

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share should be paid to his issue, if any, then living, and in default of issue should be added to the shares of the other children of the testatrix, the provision being declared to be invalid under the circumstances. *Minot* v. *Paine*, 514.

When one having a power of testamentary appointment after a life interest appoints to a person named an annuity with a general power to appoint by will a certain sum of money, this last power of appointment is void, because it is not restricted to the limitation required by the rule against perpetuities. *Ibid.*

Where the testatrix who made the will in execution of the power above described also left a large estate of her own and in her will made no distinction between her own property and that appointed, it was held that as a matter of construction the testamentary purpose to avoid intestacy should be carried out by first applying the property subject to appointment to those portions of the will which could operate lawfully as appointments, leaving the remaining gifts to be satisfied out of the testatrix's own estate and thus carrying into effect all the provisions of the will. *Ibid.*

In the case above described it was said that it was unnecessary to determine whether the same result which was arrived at by the construction of the will could have been reached by the application of the doctrine of the marshalling of assets. *Ibid.*

PERSONAL PROPERTY.

Real or Personal Property, see that title.

PHYSICIANS AND SURGEONS.

A medical or other expert cannot be allowed to be asked to give his opinion founded on "the evidence in the case," unless such evidence is admittedly capable of only one interpretation, which here was not the case. *Connor* v. *O'Donnell*, 39.

On the evidence at the trial of an indictment under St. 1915, c. 187, § 2, charging a physician with prescribing narcotic drugs, it was held that it was a question of fact for the jury whether the defendant believed that the drugs prescribed by him were needed for the treatment of the persons for whom he prescribed, or whether he was engaged in the business of issuing prescriptions to habitual drug users solely for his pecuniary gain and without reference to the question whether such drugs were needed by those who obtained them or not. *Commonwealth* v. *Noble*, 83.

In the case above described it was held that the presiding judge properly refused to rule "that, being the attending physician in the cases referred to in the indictment, he was the only person who could then determine the obvious necessity for the therapeutic treatment after examination and history of the patient; that his judgment in the matter was conclusive and could not be reviewed or inquired into in a court of law in a trial of an indictment of this kind." *Ibid.*

It was said, that to hold that the defendant's honesty of purpose could not be inquired into would be to defeat the manifest purpose of the act. *Ibid.*

At the trial of an action by an employee against his employer, a corporation, for personal injuries, where the plaintiff admitted that he received money

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from the defendant and signed an instrument purporting to release and discharge it from all claims relating thereto, and that he understood the contents of the instrument, certain evidence of conversations of the employee with a physician employed by the employer, who had given him first aid treatment, fell short of showing that the release was invalid. *Walsh* v. *Fore River Shipbuilding Co.* 89.

It also was held that there was no evidence that the defendant's physician, who gave the plaintiff only the first aid treatment, made statements of his opinion as to the plaintiff's recovery which were fraudulent or were made in bad faith or that the plaintiff's condition when he signed the release and received money therefor was such as to make him incompetent to act. *Ibid.*

It therefore was held that a verdict for the defendant was ordered rightly. *Ibid.*

In the action described above, it was held that the evidence did not warrant a finding that the relation of physician and patient, or any relation of trust and confidence, existed between the defendant's physician and the plaintiff. *Ibid.*

In the same case it was pointed out that there was nothing to indicate that the statements of the physician were other than statements of his honest opinion given in accordance with his best professional judgment based on existing symptoms. *Ibid.*

Actions for personal injuries alleged to have been caused by negligence of physicians, see PHYSICIANS AND SURGEONS.

PIER.

See WHARF.

PLEADING, CIVIL.

Interpretation of a Pleading.

The character of a pleading is to be determined by the nature of its averments and not by the name attached to it. *Commonwealth* v. *Wakelin*, 567.

Declaration.

Declaration in an action of tort against three corporations and ten individual defendants, which alleged that the plaintiff had earned a commission from one of the defendant corporations by procuring for it a contract for a sale of rifles to the purchasing agent of a foreign government and that concerted conduct of the defendant's corporation had deprived him of the commission, was held to set forth no cause of action in tort against the defendants. *Holden* v. *J. Stevens Arms Co.* 266.

A general allegation in a declaration in an action of tort against a number of defendants, that "all of the defendants herein named knowingly and intentionally participated in said unlawful scheme and conspiracy," is merely matter of characterization and does not state a cause of action. *Ibid.*

It was held that, in order to state a cause of action of the contractor for breach of a contract for the construction of a railroad from Palmer to a point in Blackstone, the declaration must allege the performance of conditions

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precedent by the approval and certificate of the defendant's engineer or that the performance of this condition was excused. *Marsch* v. *Southern New England Railroad*, 483.

Allegations in the declaration in the action above described as excuse for not procuring the approval and certificate of the defendant's engineer, were held to state no ground for questioning the decision of the engineer, who by the contract was to be disqualified as *quasi* arbitrator on no ground less than "actual fraud." *Ibid.*

Allegations in the same declaration, that the engineer "was under the absolute control and direction of the defendant, and said defendant could at any time by the terms of said contract dismiss said engineer and appoint any other person to act in his stead" were held not sufficient allegations of bias, fraud or prejudice to show collusion and fraud and were not enough to require judicial inquiry. *Ibid.*

In the same case it was held that an allegation in the declaration that "certain portions of the work, which by the terms of said contract the plaintiff was entitled to perform . . . were taken from the plaintiff . . . and given to other parties, whereby the plaintiff was deprived of the profit which would have accrued" to him, stated no cause of action, because under the contract the defendant had a right to do this. *Ibid.*

In the same case it was held that allegations contained in the declaration seeking damages on the ground, that the defendant repeatedly interrupted and suspended the progress of the work for long periods of time and prevented the plaintiff from completing the work and the construction of the roadway and that such interruptions and suspensions were not ordered in good faith, stated no cause of action, because the defendant was acting within rights given by the contract and its motive in doing what it had a right to do under the contract was immaterial. *Ibid.*

In the same case it was held that the plaintiff stated no cause of action in regard to extra work alleged to have been required of him by the defendant, because the allegations of the declaration did not bring the alleged extra work within the requirements of the contract. *Ibid.*

A declaration alleging in substance that a foreign railroad corporation, desiring to extend its line of railroad through this Commonwealth, caused a corporation to be organized and incorporated in this Commonwealth for that purpose, which was owned, officered and controlled by the foreign corporation, that the foreign corporation "through the instrumentality of its *alter ego*," the Massachusetts corporation, entered into the contract with the plaintiff for the construction of the proposed line in this Commonwealth, which was broken, was held on demurrer to state no cause of action. *Ibid.*

Demurrer.

Motions to strike out certain portions of a declaration instead of demurring to the declaration were declared to be attempts to raise in an irregular and anomalous way a question of law, which at common law and under our practice act could be determined only on demurrer or by an objection to the admission of evidence when offered in proof of the alleged facts. *Marsch* v. *Southern New England Railroad*, 483.

In the above case, however, the questions thus raised having been argued fully as if upon demurrer, the court proceeded to treat the motions as

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assignments of causes of demurrer, the defendant also having filed a demurrer to the declaration. *Marsch* v. *Southern New England Railroad*, 483.

Answer.

Under Rule 7 of the Superior Court, 1917, which requires that answers and like pleadings shall be filed within twenty-one days from the return or entry day, the twenty-one days do not begin to run until the time for such return or entry has been specified in a precept of the court served in some adequate form upon the defendant ordering him to appear. *Dunbar* v. *Rosenbloom*, 176.

A voluntary appearance and a plea *in nullo est erratum* by the defendant in a writ of error, without any objection to the jurisdiction, nearly a year after the entry of the petition for the writ, confers jurisdiction of the subject matter and of the person of the defendant upon this court, although, after the writ was served upon the court to which it was directed and the record of the judgment sought to be reversed had been returned, no writ of scire facias to the defendant was issued. *Joyce* v. *Thompson*, 254.

Motions of Defendant to strike out Portions of Declaration.

Motions to strike out certain portions of a declaration instead of demurring to the declaration were declared to be attempts to raise in an irregular and anomalous way a question of law, which at common law and under our practice act could be determined only on demurrer or by an objection to the admission of evidence when offered in proof of the alleged facts. *Marsch* v. *Southern New England Railroad*, 483.

In the above case, however, the questions thus raised having been argued fully as if upon demurrer, the court proceeded to treat the motions as assignments of causes of demurrer, the defendant also having filed a demurrer to the declaration. *Ibid.*

PLEADING, CRIMINAL.

Interpretation of a Pleading.

The character of a pleading is to be determined by the nature of its averments and not by the name attached to it. *Commonwealth* v. *Wakelin*, 567.

Complaint or Indictment.

The word "kill" is not absolutely requisite to a description of the crime of manslaughter. *Commonwealth* v. *Wakelin*, 567.

An indictment alleging that the defendant on a certain day "at Melrose in the County of Middlesex aforesaid, did assault and beat W with intent to murder her, and by such assault and beating did murder W. Against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided," is sufficient as an indictment for murder. *Ibid.*

Particulars.

It is not an improper exercise of discretion for the presiding judge to refuse to grant a motion for particulars as to an indictment for murder asking "in what manner and by what means" the defendant assaulted

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the deceased, "what was the cause of" her death, and "how and in what manner did the alleged assault and beating . . . cause" her death. *Commonwealth* v. *Wakelin*, 567.

Plea and Motions.

A defendant in an indictment for murder may not plead "Not guilty" and at the same time as a matter of right reserve the privilege of filing thereafter, either by way of substitution or otherwise, motions, pleas or other matters in their nature preliminary. *Commonwealth* v. *Wakelin*, 567.

The determination of the question, whether after pleading "Not guilty" to an indictment for murder, either in the absence of or by advice of counsel, the defendant shall be permitted to retract such plea and file others, is wholly within the discretion of the court. *Ibid.*

It is not improper for a judge presiding at the trial of an indictment for murder, to which the defendant has pleaded "Not guilty," to hear, after the jury has been impanelled and in their absence, motions by the defendant for leave to file motions to dismiss and to quash the indictment. *Ibid.*

Where, before the entry of a *nolle prosequi* to so much of an indictment for murder as charged a crime greater than manslaughter, the defendant had pleaded "Not guilty," it was not necessary that he again should be called upon to plead. *Ibid.*

"Disclaimer."

There is no such pleading as a disclaimer known to our system of criminal pleading and practice. *Commonwealth* v. *Wakelin*, 567.

Instrument filed by the district attorney, before the impanelling of the jury for the trial of an indictment for murder, which he entitled a "disclaimer," was held to be in effect a *nolle prosequi* of so much of the indictment as charged a crime of higher magnitude than manslaughter, and it was held also that the instrument was not susceptible of misunderstanding as to its essence and its real effect. *Ibid.*

Nolle prosequi.

Instrument filed by the district attorney, before the impanelling of the jury for the trial of an indictment for murder, which he entitled a "disclaimer," was held to be in effect a *nolle prosequi* of so much of the indictment as charged a crime of higher magnitude than manslaughter, and it was held also that the instrument was not susceptible of misunderstanding as to its essence and its real effect. *Commonwealth* v. *Wakelin*, 567.

Where an indictment charges that the defendant "did assault and beat W with intent to murder her, and by such assault and beating did murder W," the district attorney has power to enter a *nolle prosequi* as to so much of the indictment as charged a crime greater than manslaughter. *Ibid.*

Upon the impanelling of a jury after the entry of such *nolle prosequi*, the defendant was not entitled to challenge peremptorily more than two jurors. *Ibid.*

Where, before the entry of such *nolle prosequi*, the defendant had pleaded "Not guilty," it was not necessary that he again should be called upon to plead. *Ibid.*

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POLICE.

Where a police officer of a city, who had been fined after hearings upon charges of neglect of duty, was summoned before the chief of police of the city and a captain of police and, as a consequence of a conversation then had, signed and delivered to the chief of police a written tender of his resignation as a member of the police force of the city "to take effect on its acceptance by the chief of police," such tender of a resignation, even if valid originally, can only be construed as intended to be open for acceptance for a reasonable time. *Larrivee* v. *Chief of Police of Newton*, 169.

An acceptance of such a tender of a resignation more than six years after it was delivered is ineffectual, and after such an acceptance the officer may maintain a petition for a writ of mandamus to compel his restoration to the police force. *Ibid.*

POLICE, DISTRICT AND MUNICIPAL COURTS.

By the increase, effected by St. 1917, c. 340, § 1, upon its acceptance by the mayor and city council of Boston, in the salaries of the clerks of police, district and municipal courts, with certain exceptions, to three fourths of the salaries received by the justices of their respective courts from three fifths thereof, as previously provided by St. 1904, c. 453, § 1, the salaries of the assistant clerks, which by the same section of St. 1904, c. 453, had been made two thirds of the salaries of the clerks, were increased to two thirds of the increased salaries of the respective clerks. *Simmons* v. *County of Suffolk*, 236.

POWER.

Where, by reason of the failure of a donee of a power in a deed to exercise the power in her will, the property passed to a trustee, it was held that no legacy or succession tax was due from the trustee, because no one had become entitled to the possession or enjoyment of the property by reason of the donee's failure to exercise the power given to her, although thereby a new power of appointment had come into existence. *Attorney General* v. *Thorp*, 25.

Rule for the determination of the beginning of the period of valid executory limitation as determined by the rule against perpetuities for estates made by the exercise of a general power of testamentary appointment over a fund given by will to a person who during his life is given only the income of the fund without power of appointment by deed. *Minot* v. *Paine*, 514.

Application of such rule to an appointment by will to trustees after the death of the trustee's husband "to hold the same for the benefit of my children," each to receive a share of the income "until he shall have attained the age of twenty five years, and on his attaining the age of twenty five years, to transfer and convey his equal and proportionate share of the trust fund to such son in fee, free of these trusts," such appointment under the circumstances being declared to be valid. *Ibid.*

Further application of the rule to a provision in the same will for a fourth son, that, after the death of his father, his proportionate share of the fund should be set apart as a separate fund, of which he should receive the in-

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come during his life, and that at his death the income of an amount named should be paid to his adopted daughter, named, and that the remainder of his share should be paid to his issue, if any, then living and in default of issue should be added to the shares of the other children of the testatrix, the provision being declared to be invalid under the circumstances. ***Minot*** v. *Paine*, 514.

When one having a power of testamentary appointment after a life interest appoints to a person named an annuity with a general power to appoint by will a certain sum of money, this last power of appointment is void, because it is not restricted to the limitation required by the rule against perpetuities. *Ibid.*

Where the testatrix who made the will in execution of the power above described also left a large estate of her own and in her will made no distinction between her own property and that appointed, it was held that as a matter of construction the testamentary purpose to avoid intestacy should be carried out by first applying the property subject to appointment to those portions of the will which could operate lawfully as appointments, leaving the remaining gifts to be satisfied out of the testatrix's own estate and thus carrying into effect all the provisions of the will. *Ibid.*

In the case above described it was said that it was unnecessary to determine whether the same result which was arrived at by the construction of the will could have been reached by the application of the doctrine of the marshalling of assets. *Ibid.*

PRACTICE, CIVIL.

Service of Process.

A judgment in an action of contract is not subject to reversal upon a writ of error merely because the officer's return upon the writ states that, after making a nominal attachment, he left the summons "at his [the defendant's] last and usual place of abode," without adding the words "known to me to be such," the only reasonable interpretation of such a return being that the officer knew the facts to be as averred in his return, which showed a compliance with the requirements of R. L. c. 167, § 31. *Joyce* v. *Thompson*, 254.

Bond to dissolve Attachment.

See appropriate subtitle under BOND.

Appearance.

Effect of a voluntary appearance and a plea *in nullo est erratum* to a writ of error. *Joyce* v. *Thompson*, 254.

Parties.

An action of contract for money had and received cannot be maintained against two defendants jointly to recover money received to the plaintiff's use by only one of them. *Henry W. Savage, Inc.* v. *Wheelock*, 111.

It here was assumed for the purposes of decision, that an administrator *de bonis non* with the will annexed was the proper party to sue for damages

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suffered by the negligent withholding of the will. *Sawyer* v. *Old Lowell National Bank*, 342.

It is improper to join in one action for breach of contract a corporation which made the contract and another corporation which, it is alleged, used the first corporation as its "*alter ego*" or agent for that purpose. *Marsch* v. *Southern New England Railroad*, 483.

Amendment.

An amendment to the writ and declaration in an action against the maker of a promissory note, adding as a party defendant an indorser of the note, does not change the liability upon a bond to dissolve an attachment given by the first defendant before the allowance of the amendment. *Salvin* v. *Sidman*, 278.

Therefore, the allowance of such an amendment without notice to the surety does not discharge such surety, and, after judgment against both defendants by default, the plaintiff may maintain an action upon the bond against such surety. *Ibid.*

At the trial of an action for personal injuries, where the declaration contained two counts and the only issue tried was that contained in the second count, which was tried fully on the merits, the judge refused to order a verdict for the defendant on either of the counts, and the jury returned a verdict for the plaintiff. *Erickson* v. *Buckley*, 467.

Upon exceptions alleged by the defendant, it was held that, as the verdict was warranted by the evidence on the second count, the defendant was not harmed by the judge's refusal to order a verdict for him on the first count, which could be cured by the allowance of an amendment to the first count after verdict. *Ibid.*

An appeal to this court from an order of the Appellate Division, upon a report after a finding for the defendant, giving the plaintiff leave to amend the declaration within ten days, in which case there should be a new trial upon the declaration as amended, and ordering that otherwise the report should be dismissed, which appeal was claimed within the ten days after the order, must be from that part of the order of the Appellate Division which gave the plaintiff leave to amend in ten days and ordered a new trial if the amendment were made. *Hall Publishing Co.* v. *MacLaughlin*, 534.

Such an order of the Appellate Division is not within the ten days a "final decision" of the Appellate Division from which an appeal will lie to this court; and a claim of an appeal by the defendant within the ten days must be dismissed. *Ibid.*

Set-off.

Where a defendant in an action of contract files a declaration in set-off setting forth a claim which is a proper subject of set-off, he has a right to a determination of the question, whether he is entitled to recover the whole or any part of his claim. *Woodworth* v. *Fuller*, 160.

Where such an action is referred to an auditor who finds for the plaintiff in the main action and that there was no right of recovery upon the declaration in set-off, and the case thereafter is tried before a jury, the auditor's report being introduced in evidence, if the jury find for the plaintiff in the sum found by the auditor with interest, this, in the absence of any specific find-

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ing upon the declaration in set-off, will not warrant the inference that the jury also intended to adopt the auditor's other finding and to deny recovery upon the declaration in set-off. *Woodworth* v. *Fuller*, 160.

Judge in such a case is not warranted in denying a new trial because he is convinced that the jury intended to follow the finding of the auditor. *Ibid.*

Rules of Court.

Common Law Rule 32 of the Supreme Judicial Court. *Joyce* v. *Thompson*, 254.

Rule 7 of the Superior Court, 1917. *Dunbar* v. *Rosenbloom*, 176.

Divorce Rule 6. *Feldman* v. *Feldman*, 330.

Conduct of Trial.

Opening statement and argument of counsel.

Insertion in a plaintiff's bill of exceptions of a statement of the opening to the jury by the defendant's counsel, where there was nothing in the opening to indicate that it was intended as an admission or that it differed in any essential particular from the evidence afterwards introduced by the defendant, was held to have been improper. *Mercier* v. *Union Street Railway*, 397.

Such opening therefore was held not to be a part of the record. *Ibid.*

Requests, rulings and instructions.

Judge properly refused to rule that the plaintiff could not recover under a certain guaranty clause in a contract, because the request for the ruling was inappropriate, the plaintiff having made no claim under that clause. *Dondis* v. *Borden*, 73.

Rulings properly refused because predicated on facts which the jury might not have found to be otherwise. *Ibid.*

In an action by a carpenter against his employer for personal injuries sustained, before the workmen's compensation act took effect, when the plaintiff was at work piling sawed hard pine lumber by means of an engine, a derrick and a pair of tongs and caused by one of the timbers slipping from the tongs due to their being unsuitable and unsafe for hoisting such timbers, it was held not to be a defence that the tongs supplied by the defendant were in common use for the purpose for which the defendant used them and that a ruling setting aside a verdict for the plaintiff on that ground was wrong. *Wilson* v. *Alexander*, 242.

At the trial of issues framed in a suit in equity brought by an insurance company against one, insured by it against liability arising from accidents in which his motor vehicle was involved, and an attorney at law alleged to have been in collusion with the insured to defraud the plaintiff, to enjoin the insured from maintaining an action of contract upon the policy, instructions contained in the charge to the jury to the effect that the attorney had a legal right to represent the insured in matters unrelated to the action against him by the person who was injured in the collision with the motor vehicle and to represent the injured person in that action were held to contain no error. *Maryland Casualty Co.* v. *Jackson*, 384.

An exception to the conduct of the judge presiding at a trial of the issues in the suit above described, in reading to the jury at the close of his charge requests previously presented to him by one of the parties, with comments upon them

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as he read them, instead of covering the subject matter of the requests in the course of his charge, was overruled. *Maryland Casualty Co.* v. *Jackson*, 384.

Judge's charge.

At the trial of issues framed in a suit in equity brought by an insurance company against one, insured by it against liability arising from accidents in which his motor vehicle was involved, and an attorney at law alleged to have been in collusion with the insured to defraud the plaintiff, to enjoin the insured from maintaining an action of contract upon the policy, instructions contained in the charge to the jury to the effect that the attorney had a legal right to represent the insured in matters unrelated to the action against him by the person who was injured in the collision with the motor vehicle and to represent the injured person in that action were held to contain no error. *Maryland Casualty Co.* v. *Jackson*, 384.

It further was held that it was not fairly open to the plaintiff to argue as to such instructions that "the stamp of approval given by the court as a matter of law to the action of" the attorney "prevented the jury from considering this very vital element [of collusion] in passing upon the contentions of the plaintiff." *Ibid.*

At the trial of an action against a street railway corporation for personal injuries sustained, before the passage of the workmen's compensation act and St. 1914, c. 553, when the plaintiff, while working for the defendant in a sand pit, was run into by a loaded sand car, the charge to the jury, having been warranted by the evidence, was held not open to exception because, in any event, the judge was careful not to impose his recollection of the evidence upon the jury. *Fratto* v. *Boston Elevated Railway*, 388.

Instructions in the charge of the judge at the trial of an action for causing death relating to the question, whether the death was caused by the negligence of the defendant, were held not to be fairly susceptible of the construction that there could be recovery even though confinement to bed and consequent weakness were not the result of the accident or their proximate cause, but were held to mean that there could be no recovery except for consequences flowing from the fall as their operative cause, which was a correct statement of the law. *Charles* v. *Boston Elevated Railway*, 536.

Further deliberation by jury after separation.

Action of the judge presiding at a trial, when, after a jury which had separated after having agreed on answers to special questions relating to liability but had failed to agree as to an answer relating to damages, reported to court and the judge had satisfied himself that an agreement might be reached as to the unanswered question and that no member of the panel had talked with anybody in any manner about the case, in ordering the jury to return to their room and consider the unanswered question further and, upon their return with an answer, in ordering a finding for the plaintiff based thereon, was held not to be an improper exercise of his discretion. *Charles* v. *Boston Elevated Railway*, 536.

Ordering of Verdict.

Verdict for the defendant in an action for personal injuries was held rightly to have been ordered, where the plaintiff admitted that he executed and

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delivered a release and there was no evidence warranting a finding that the release was made voidable by reason of fraud. *Walsh* v. *Fore River Shipbuilding Co.* 89.

On the evidence at the trial of an action by an administrator of the estate of his mother against his sister for money alleged to have been "received and borrowed" by the defendant from her mother it was held that a finding for a plaintiff was not warranted and a verdict properly might be ordered for the defendant. *Harrington* v. *Cousins*, 366.

Finding by Judge.

No exception lies to the refusal of a judge sitting without a jury to make specific findings of fact. *Puffer Manuf. Co.* v. *Yeager*, 557.

Where, at the trial of an action for breach of a contract to accept and pay for marble furnished for the construction of a government building, there was conflicting evidence as to whether a written statement of a condition that samples should be approved by the supervising architect was included in a set of plans sent to the plaintiff by the defendant and the judge found for the plaintiff, it was held that this finding must mean that the judge found that no such written statement was furnished to the plaintiff and that the plaintiff had no notice of such a custom; and that, upon such findings, a further finding for the plaintiff was warranted. *Ibid.*

Special Question to Jury.

Action of the judge presiding at a trial, when, after a jury which had separated after having agreed on answers to special questions relating to liability but had failed to agree as to an answer relating to damages, reported to court and the judge had satisfied himself that an agreement might be reached as to the unanswered question and that no member of the panel had talked with anybody in any manner about the case, in ordering the jury to return to their room and consider the unanswered question further and, upon their return with an answer, in ordering a finding for the plaintiff based thereon, was held not to be an improper exercise of his discretion. *Charles* v. *Boston Elevated Railway*, 536.

Private View by Juror.

If a juror during the trial of an action of tort on his own initiative privately takes a view of premises, the character of which is an issue at the trial, thus obtaining evidence outside of that introduced in the court room, such conduct does not require a new trial as a matter of law; and where, upon a motion for a new trial based upon such conduct of the juror, the trial judge finds, on evidence warranting the finding, that the conduct of the juror did no harm to the party against whom a verdict was rendered, the judge in his discretion may deny the motion. *Collins* v. *Splane*, 281.

Further Deliberation by Jury after Separation.

Action of the judge presiding at a trial, when, after a jury which had separated after having agreed on answers to special questions relating to liability but had failed to agree as to an answer relating to damages, reported to

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court and the judge had satisfied himself that an agreement might be reached as to the unanswered question and that no member of the panel had talked with anybody in any manner about the case, in ordering the jury to return to their room and consider the unanswered question further and, upon their return with an answer, in ordering a finding for the plaintiff based thereon, was held not to be an improper exercise of his discretion. *Charles* v. *Boston Elevated Railway*, 536.

New Trial.

After a verdict has been returned for the plaintiff in an action at law and when a motion for a new trial is pending, if the presiding judge is of opinion that the verdict should be set aside solely because of excessive damages and is in doubt as to the status of the defendant's exceptions taken at the trial in case the verdict in its entirety is set aside solely for that reason, and if the questions of law that arose at the trial affect decisive issues as to liability, it is proper for the judge to report the case for determination by this court and he has power to do so without passing first on the motion for a new trial. *Fuller* v. *Andrew*, 139.

Where, in an action in which the defendant filed a declaration in set-off and an auditor found there was no right of recovery in set-off, after the rendering of a verdict which does not include a finding upon the declaration in set-off, the defendant files a motion for a new trial on the ground that the jury, "in assessing said verdict, did not make a finding upon the declaration in set-off," the judge is not warranted in denying the motion on the ground that he is "convinced that they [the jury] intended to follow the reports of the auditor, and to find for the defendant in set-off, and believed they accomplished this end by reporting simply a verdict for the plaintiff in the main action." *Woodworth* v. *Fuller*, 160.

If a juror during the trial of an action of tort on his own initiative privately takes a view of premises, the character of which is an issue at the trial, thus obtaining evidence outside of that introduced in the court room, such conduct does not require a new trial as a matter of law; and where, upon a motion for a new trial based upon such conduct of the juror, the trial judge finds, on evidence warranting the finding, that the conduct of the juror did no harm to the party against whom a verdict was rendered, the judge in his discretion may deny the motion. *Collins* v. *Splane*, 281.

In an action for personal injuries, the defendant excepted to the denial of a motion for a new trial because of newly discovered evidence and the court held that the record showed no abuse of discretion by the judge in denying the motion. *Miller* v. *Flash Chemical Co.* 419.

A decision of the Appellate Division of the Municipal Court of the City of Boston ordering a new trial of an action is not a decision from which an appeal lies directly to this court. *Real Property Co. Inc.* v. *Pitt*, 526.

An appeal to this court from an order of the Appellate Division, upon a report after a finding for the defendant, giving the plaintiff leave to amend the declaration within ten days, in which case there should be a new trial upon the declaration as amended, and ordering that otherwise the report should be dismissed, which appeal was claimed within the ten days after the order, must be from that part of the order of the Appellate Division which gave the plaintiff leave to amend in ten days and ordered a new

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trial if the amendment were made. *Hall Publishing Co.* v. *MacLaughlin*, 534.

Such an order of the Appellate Division is not within the ten days a "final decision" of the Appellate Division from which an appeal will lie to this court; and a claim of an appeal by the defendant within the ten days must be dismissed. *Ibid.*

A judge is not bound as a matter of law to grant a new trial because of newly discovered evidence which, if presented to a jury and believed by them, would warrant the reaching of a different result. *Davis* v. *Custer*, 603.

Denial of a motion for a new trial of an action of tort for malicious prosecution and false arrest, at the trial of which the plaintiff and his daughter had testified that the plaintiff was arrested on a warrant, procured by the defendant, and was handcuffed and, while so handcuffed and on the way to the police station, met acquaintances, the motion being supported by affidavits of three police officers that no handcuffs were used upon the plaintiff and that no one was met on the journey to the station except a police officer, it was held, could not be said to be an abuse of discretion. *Ibid.*

Report.

After a verdict has been returned for the plaintiff in an action at law and when a motion for a new trial is pending, if the presiding judge is of opinion that the verdict should be set aside solely because of excessive damages and is in doubt as to the status of the defendant's exceptions taken at the trial in case the verdict in its entirety is set aside solely for that reason, and if the questions of law that arose at the trial affect decisive issues as to liability, it is proper for the judge to report the case for determination by this court, and he has power to do so without passing first on the motion for a new trial. *Fuller* v. *Andrew*, 139.

Record upon a report by a judge presiding at the trial of an action of contract by a railroad corporation for certain freight and other charges was held to show that the case was tried upon a statement of agreed facts submitted as evidence, which with "the original freight bills" was the basis from which the ultimate decisive facts so far as necessary must be determined. *New York Central & Hudson River Railroad* v. *York & Whitney Co.* 206.

In the case described above it also was held that, where more than one rational inference could be drawn from the evidence as stated, a question of fact for the jury was presented, and the only question of law in regard to such an inference was whether the jury's finding of fact was warranted. *Ibid.*

A report of a judge in an action for personal injuries by an employee against her employers wherein the judge ruled that the plaintiff had assumed the risk of injury and that the provisions of St. 1909, c. 363, did not apply, the report stipulating that, if the ruling was correct, judgment was to be entered for the defendants, and if incorrect, judgment was to be entered for the plaintiff, was held to be broad enough to raise the question of the impropriety of the ruling of the judge, due to the fact that there was evidence upon which the jury might have found that a new contract of employment for a new period was entered into which made the statute in question applicable; and that therefore, the ruling being improper, judgment should be entered for the plaintiff. *Wood* v. *Danas*, 587.

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Exceptions.

Exception to the wrongful admission of a question of an expert at the trial of an action for personal injuries which was overruled as not having injuriously affected the substantial rights of the defendant, since it appeared that the testimony was merely cumulative upon other evidence. *Duggan* v. *Bay State Street Railway*, 370.

At the trial of an action against a street railway corporation for personal injuries sustained, before the passage of the workmen's compensation act and St. 1914, c. 553, when the plaintiff, while working for the defendant in a sand pit, was run into by a loaded sand car, the charge to the jury having been warranted by the evidence, was held not open to exception because, in any event, the judge was careful not to impose his recollection of the evidence upon the jury. *Fratto* v. *Boston Elevated Railway*, 388.

Insertion in a plaintiff's bill of exceptions of a statement of the opening to the jury by the defendant's counsel, where there was nothing in the opening to indicate that it was intended as an admission or that it differed in any essential particular from the evidence afterwards introduced by the defendant, was held to have been improper. *Mercier* v. *Union Street Railway*, 397.

Such opening therefore was held not to be a part of the record. *Ibid.*

At the trial of an action for personal injuries, where the declaration contained two counts and the only issue tried was that contained in the second count, which was tried fully on the merits, the judge refused to order a verdict for the defendant on either of the counts, and the jury returned a verdict for the plaintiff, and upon exceptions alleged by the defendant, it was held that, as the verdict was warranted by the evidence on the second count, the defendant was not harmed by the judge's refusal to order a verdict for him on the first count, which could be cured by the allowance of an amendment to the first count after verdict. *Erickson* v. *Buckley*, 467.

It was held that certain evidence admitted unqualifiedly and without any objection or exception at the hearing of a petition for the registration of the title to certain land where the existence of a way by necessity is an issue, as to the expressed intention of a former owner of the locus, in conveying it to another, that the grantee would use, to reach a public way otherwise inaccessible excepting over the remaining land of the grantor, a way across land then owned by the grantee's wife, must be given proper probative force and that its admissibility could not be considered by this court. *Orpin* v. *Morrison*, 529.

Where, at the close of all the evidence at the hearing of the petition above described, the judge ruled that the evidence described was competent and an exception was taken, such ruling and exception do not bring to this court the question of the admissibility or competency of the evidence. *Ibid.*

No exception lies to the refusal of a judge sitting without a jury to make specific findings of fact. *Puffer Manuf. Co.* v. *Yeager*, 557.

Appeal.

An appeal in an action at law under R. L. c. 173, § 96, as amended, brings before this court only errors "founded upon matter of law apparent on the record." *Moran* v. *Murphy*, 5.

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Where on an appeal to this court in an action of law there was appended to the record and printed as a part of the appeal what purported to be a copy of all the evidence in the case, it was held that this constituted no part of the record and could not be considered by the court. *Moran* v. *Murphy*, 5.

The "final decision of the Appellate Division" of the Municipal Court of the City of Boston from which by St. 1912, c. 649, § 9, a right to appeal directly to this court is given, means a decision which terminates litigation on the merits of the controversy, directs what judgment shall be entered and leaves nothing to the judicial discretion of the trial court. *Real Property Co. Inc.* v. *Pitt*, 526.

A decision of the Appellate Division of the Municipal Court of the City of Boston ordering a new trial of an action is not a decision from which an appeal lies directly to this court. *Ibid.*

An appeal to this court from an order of the Appellate Division, upon a report after a finding for the defendant, giving the plaintiff leave to amend the declaration within ten days, in which case there should be a new trial upon the declaration as amended, and ordering that otherwise the report should be dismissed, which appeal was claimed within the ten days after the order, must be from that part of the order of the Appellate Division which gave the plaintiff leave to amend in ten days and ordered a new trial if the amendment were made. *Hall Publishing Co.* v. *MacLaughlin*, 534.

Such an order of the Appellate Division is not within the ten days a "final decision" of the Appellate Division from which an appeal will lie to this court; and a claim of an appeal by the defendant within the ten days must be dismissed. *Ibid.*

Record.

Where on an appeal to this court in an action of law there was appended to the record and printed as a part of the appeal what purported to be a copy of all the evidence in the case, it was held that this constituted no part of the record and could not be considered by the court. *Moran* v. *Murphy*, 5.

Record upon a report by the judge presiding at the trial of an action of contract by a railroad corporation for certain freight and other charges was held to show that the case was tried upon a statement of agreed facts submitted as evidence, which with "the original freight bills" was the basis from which the ultimate decisive facts so far as necessary must be determined. *New York Central & Hudson River Railroad* v. *York & Whitney Co.* 206.

Insertion in a plaintiff's bill of exceptions of a statement of the opening to the jury by the defendant's counsel, where there was nothing in the opening to indicate that it was intended as an admission or that it differed in any essential particular from the evidence afterwards introduced by the defendant, was held to have been improper. *Mercier* v. *Union Street Railway*, 397.

Such opening therefore was held not to be a part of the record. *Ibid.*

Divorce Proceedings.

See MARRIAGE AND DIVORCE.

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Practice in Municipal Court of the City of Boston.

Practice peculiar to the MUNICIPAL COURT OF THE CITY OF BOSTON, see that title.

Procedure under Workmen's Compensation Act.

See appropriate subtitle under WORKMEN'S COMPENSATION ACT.

Writ of Error.

See that title.

PRACTICE, CRIMINAL.

Challenge of Jurors.

Upon the impanelling of a jury after the entry of a *nolle prosequi* as to so much of an indictment for murder as charged a crime greater than manslaughter, the defendant was not entitled to challenge peremptorily more than two jurors. *Commonwealth* v. *Wakelin*, 567.

Evidence.

Whether R. L. c. 175, § 66, relating to the admission in evidence of a declaration of a deceased person, is applicable at the trial of an indictment for manslaughter, was not decided, evidence which was excluded partly on that ground having also been excluded rightly because the presiding judge found that the statements offered were not made in good faith. *Commonwealth* v. *Wakelin*, 567.

Where the district attorney at the trial of an indictment for manslaughter fails to require the exclusion, as incompetent, of evidence tending to show that a third person out of court had confessed to the commission of the crime with which the defendant was charged, he is not thereby precluded from objecting to the introduction of further evidence of statements by the same third person tending to substantiate his alleged confession. *Ibid.*

The Commonwealth, having failed at the trial of an indictment for manslaughter to require the exclusion as incompetent of evidence of a confession by a third person of the commission of the crime with which the defendant was charged, and such testimony being admitted, may be permitted against the objection of the defendant to introduce testimony tending to show that at the time of the commission of the crime such third person was in a distant part of the Commonwealth. *Ibid.*

PROBATE COURT.

Jurisdiction.

Whether the remedy for the failure of a person having custody of a will to deliver such will into the Probate Court, which is given by R. L. c. 135, § 14, "to a person who is aggrieved for the damage sustained by him by reason of such neglect," is an exclusive remedy, here was referred to as a question that was not passed upon. *Sawyer* v. *Old Lowell National Bank*, 342.

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Master.

On a petition under R. L. c. 162, § 13, to enter late an appeal from a decree of the Probate Court denying a petition to be appointed the administrator *de bonis non* of the estate of a certain intestate on the ground that the petitioner was the son and the only living heir of the intestate, the master having found, on evidence not reported, that the petitioner was not the son of the intestate, it was held that the petition was dismissed rightly. *Phillips* v. *Phillips*, 14.

Appeal.

On a petition under R. L. c. 162, § 13, to enter late an appeal from a decree of the Probate Court denying a petition to be appointed the administrator *de bonis non* of the estate of a certain intestate on the ground that the petitioner was the son and the only living heir of the intestate, the master having found, on evidence not reported, that the petitioner was not the son of the intestate, it was held that the petition was dismissed rightly. *Phillips* v. *Phillips*, 14.

PROXIMATE CAUSE.

Question, whether violation of St. 1911, c. 244, § 1, in failing to procure the permit required before starting a certain fire, was a proximate cause of the burning of certain buildings, was held to be a question for the jury. *Todd* v. *Traders & Mechanics Ins. Co.* 595.

In a claim under the workmen's compensation act, where the Industrial Accident Board has found, on evidence warranting such a finding, that the employee, who already had heart disease and colitis, sustained an injury arising out of and in the course of his employment that aggravated and accelerated the diseases from which he was suffering so that he died six days after the injury, an award of compensation to his dependent widow is justified. *Fitzgibbons's Case*, 473.

Instructions in the charge of the judge at the trial of an action for causing death relating to the question, whether the death was caused by the negligence of the defendant, were held not to be fairly susceptible of the construction that there could be recovery even though confinement to bed and consequent weakness were not the result of the accident or their proximate cause, but were held to mean that there could be no recovery except for consequences flowing from the fall as their operative cause, which was a correct statement of the law. *Charles* v. *Boston Elevated Railway*, 536.

PUBLIC OFFICER.

Whether property impounded by a certain order of court was held by its custodian as a public officer who was accountable for it merely as such officer within R. L. c. 189, § 31, cl. 3, it was not necessary to consider. *Wallace* v. *Coyne*, 475.

RAILROAD.

Mail carrier who, while engaged in the performance of his duties upon a cinder walk between tracks at a railroad station, was struck by a train coming from the west, was held to have been entitled to rely to a certain extent upon a custom, which could have been found to exist and of which he had

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knowledge, that the train from the west under the circumstances should wait beyond the switch until the train upon the siding had discharged mail, express matter and passengers and until those obliged to cross the main track had had an opportunity to reach a place of safety. *French* v. *Boston & Maine Railroad*, 163.

Whether the provisions of St. 1911, c. 751, Part I, § 1, deprive a railroad corporation which is not a subscriber under the workmen's compensation act of the defences of contributory negligence and assumption of risk in an action brought against it under St. 1906, c. 463, Part I, § 63, as amended by St. 1907, c. 392, and St. 1912, c. 354, for causing the death of one of its employees, here was mentioned as a question which it was not necessary to decide in the present case. *Hix* v. *New York Central & Hudson River Railroad*, 309.

The fact that a railroad corporation, without being ordered so to do by the railroad commissioners or the public service commission under St. 1906, c. 463, Part II, § 151, voluntarily assumed the duty of maintaining a bell operated by an electrical appliance to warn the public against the danger of cars and engines approaching a grade crossing of the railroad with a highway, does not warrant an inference that it also assumed the duty of so warning the public against the danger of collision with a car standing still on the track at the crossing at night, or that the mechanism was intended for that purpose. *McGlauflin* v. *Boston & Maine Railroad*, 431.

See also NEGLIGENCE, *Railroad*.

REAL OR PERSONAL PROPERTY.

Under St. 1909, c. 490, Part IV, § 1, as amended by St. 1916, c. 268, § 1, shares of a real estate trust, the general scheme of which works a conversion of all the property of the trust into personalty as one fund from the outset, are personal property and are not subject to the tax. *Priestley* v. *Treasurer & Receiver General*, 452.

Deed of trust creating a real estate trust which, under the same statute, was held to bring about no equitable conversion of the real property into personalty with the result that shares of such a trust that belonged to a testator who died domiciled in a foreign country were subject to a legacy and succession tax. *Ibid.*

The declaration of trust creating the real estate trust first above described, of which the shares were held to be personal property, contained a provision that the "shares hereunder shall be personal property," and, in regard to the partnership real estate trust whose shares were held to be real estate, it was pointed out that the deed of trust creating that partnership contained no provision that the shares should be personal property, "whatever the legal effect of such a clause may be." *Ibid.*

If what is desired in order to carry out the purposes of a real estate trust is an organization with a distinct entity, intermediate between a corporation and a partnership or pure trust and with its own rights and obligations, the Legislature and not the courts must be resorted to. By DE COURCY, J. *Ibid.*

RECEIVER.

Where upon a petition to the Superior Court, alleging that the debts of a certain corporation carrying on an established manufacturing business were

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Receiver (*continued*).

not being paid although its assets were sufficient for that purpose and containing no allegation of insolvency, that court appointed a receiver, and afterwards in bankruptcy proceedings a trustee of the corporation was appointed, who appealed from a decree of the Superior Court allowing the receiver's account, it was held, under the circumstances, that the Superior Court, which rightly appointed the receiver, had jurisdiction of all questions relating to his accounting and final discharge, including the fixing of the amounts of compensation for him and his attorneys. *Shanton* v. *Shepard Manuf. Co. Inc.* 224.

Where at the time of the filing of a petition in bankruptcy the property of the bankrupt was in the hands of a receiver appointed by the Superior Court, that court has jurisdiction to settle the accounts of its receiver relating to his charge of the property up to the time of the adjudication in bankruptcy some months after the filing of the petition. *Ibid.*

In fixing the amount to be allowed to the receiver for expenses incurred for counsel fees it was held to have been proper to allow the amount of compensation paid to counsel for services rendered for the common benefit of the persons interested in bringing the original bill in equity upon which the receiver was appointed. *Ibid.*

In the case above described, in which the evidence was not reported, it was held that, in the absence of any evidence, the charges for compensation could not be pronounced to be excessive and that the finding of the Superior Court on that question of fact could not be set aside. *Ibid.*

RECORD.

See that subtitle under PRACTICE, CIVIL.

RELEASE.

At the trial of an action by an employee against his employer, a corporation, for personal injuries, where the plaintiff admitted that he received money from the defendant and signed an instrument purporting to release and discharge it from all claims relating thereto, and that he understood the contents of the instrument, certain evidence of conversations of the employee with a physician employed by the employer, who had given him first aid treatment, fell short of showing that the release was invalid. *Walsh* v. *Fore River Shipbuilding Co.* 89.

It also was held that there was no evidence that the defendant's physician, who gave the plaintiff only the first aid treatment, made statements of his opinion as to the plaintiff's recovery which were fraudulent or were made in bad faith or that the plaintiff's condition when he signed the release and received money therefor was such as to make him incompetent to act. *Ibid.*

It therefore was held that a verdict for the defendant was ordered rightly. *Ibid.*

Upon the evidence at the trial of an action for personal injuries from being struck on the head by a piece of ice falling from a building of the defendant as to the circumstances under which the plaintiff accepted $5 and signed a release, it was held that the jury were warranted in finding that the defendant's agent made representations that the release referred only to damage to the plaintiff's muff and that they were binding upon the defendant, and that the release therefore did not bar the action. *Connors* v. *Richards*, 436.

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REMOVAL OF SUITS.

Under the Judicial Code, U. S. St. 1911, c. 231, §§ 24, 28, 29, in an action to recover a sum greater than $3,000 brought in the Superior Court by a resident of this Commonwealth against a resident of another State begun by trustee process, in which numerous residents of this Commonwealth are named as trustees and where no service of the writ was made upon the defendant, who appeared specially only to file a petition for the removal of the case to the District Court of the United States, the petition for removal must be granted as matter of right on the record and, if any issues of fact are raised, they must be heard and determined in the federal court. *Dunbar* v. *Rosenbloom*, 176.

In such a case the residence of the persons summoned as trustees is immaterial upon the question of the right to removal, they being merely stakeholders having no interest in the main controversy. *Ibid.*

Since, in the case above described, the petitioner had not been served with process and had not appeared voluntarily before he filed his petition for removal, it was held that the twenty-one days, mentioned in Rule 7 of the Superior Court, 1917, as the time within which answers and like pleadings should be filed had not begun to run and that the defendant had complied with the requirement of § 29 of the Judicial Code by filing his petition for removal earlier than the time limited by the rule. *Ibid.*

Under § 51 of the Judicial Code, which provides that "where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant," a defendant resident in another State may maintain a petition for removal of the case to the District Court of the United States for the District of Massachusetts if the plaintiff is a resident of this district. *Ibid.*

RESIGNATION.

Where a police officer of a city, who had been fined after hearings upon charges of neglect of duty, was summoned before the chief of police of the city and a captain of police and, as a consequence of a conversation then had, signed and delivered to the chief of police a written tender of his resignation as a member of the police force of the city "to take effect on its acceptance by the chief of police," such tender of a resignation, even if valid originally, can only be construed as intended to be open for acceptance for a reasonable time. *Larrivee* v. *Chief of Police of Newton*, 169.

An acceptance of such a tender of a resignation more than six years after it was delivered is ineffectual, and after such an acceptance the officer may maintain a petition for a writ of mandamus to compel his restoration to the police force. *Ibid.*

RES IPSA LOQUITUR.

See that subtitle under NEGLIGENCE.

RULE AGAINST PERPETUITIES.

See PERPETUITIES, RULE AGAINST.

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RULES OF COURT.

Common Law Rule 32 of the Supreme Judicial Court. *Joyce* v. *Thompson*, 254.

Equity Rule 31. *Arnold* v. *Maxwell*, 441.

Rule 7 of the Superior Court, 1917. *Dunbar* v. *Rosenbloom*, 176.

Divorce Rule 6. *Feldman* v. *Feldman*, 330.

SAFE DEPOSIT BOX.

Where one, who has hired a safe deposit box from a national bank and who also has a deposit account in the bank, leaves with the officials of the bank a tin box, without disclosing its contents, which is placed in a bank vault where books and records are stored, the bank does not become the bailee of a will of the depositor contained in the tin box. *Sawyer* v. *Old Lowell National Bank*, 342.

SALE.

Warranty.

In a contract for the sale of cod liver oil the phrases "cold pressed provincial medicine oil" and "pure medicinal cod liver oil" were held to be descriptive of the kind and quality of oil required so as to constitute words of warranty. *Leonard* v. *Carleton & Hovey Co.* 262.

In an action for the price of cod liver oil sold and delivered, where the defendant contended that he was not bound to take and pay for the oil because it was not of the kind and quality required by the contract, it was held that there was evidence warranting a finding that "cold pressed provincial medicine oil" and "pure medicinal cod liver oil" meant, as used in the trade, merchantable provincial or domestic oil made from the fresh livers of the cod and kindred fish, such as pollock, hake and haddock, excluding oil obtained from the livers of dog fish, and that the oil furnished by the plaintiff was of this kind and quality. *Ibid.*

Validity.

If a stockbroker, who had transactions with a customer carried on upon margins, and made an agreement to carry certain stock upon margin for him as long as he wished and to deliver to him on demand the same number of shares upon payment of what he might then owe, sold the stock in question to himself, such sale was a breach of the duty owed by the stockbroker to the customer and was voidable by the customer. *Hall* v. *Paine*, 62.

In order to avoid such sales, it was necessary for the plaintiff to repudiate them after he discovered their voidable character. *Ibid.*

Neither a certain letter written by the customer to the stockbroker before he learned of certain improper sales by the stockbroker to himself of securities of the customer, nor the bringing of an action against the stockbroker, in the course of the trial of which the customer for the first time learned of the sales, could be regarded as a repudiation of them. *Ibid.*

If the plaintiff did not repudiate such sales upon learning of their voidable character, he must be taken to have ratified them. *Ibid.*

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Voidable by Infant.

An infant who avoids a purchase made by him under a contract of conditional sale and returns the article purchased is not liable in damages for deterioration of the article while in his possession under the contract. *Knudson* v. *General Motorcycle Sales Co. Inc.* 54.

Rescission.

If a stockbroker, who had transactions with a customer carried on upon margins and made an agreement to carry certain stock upon margin for him as long as he wished and to deliver to him on demand the same number of shares upon payment of what he might then owe, sold the stock in question to himself, such sale was a breach of the duty owed by the stockbroker to the customer and was voidable by the customer. *Hall* v. *Paine*, 62.

In order to avoid such sales, it was necessary for the plaintiff to repudiate them after he discovered their voidable character. *Ibid.*

Neither a certain letter written by the customer to the stockbroker before he learned of certain improper sales by the stockbroker to himself of securities of the customer, nor the bringing of an action against the stockbroker, in the course of the trial of which the customer for the first time learned of the sales, could be regarded as a repudiation of them. *Ibid.*

If the plaintiff did not repudiate such sales upon learning of their voidable character, he must be taken to have ratified them. *Ibid.*

Tax Sale.

See TAX.

Liability of Seller of Dangerous Article of Merchandise.

See DANGEROUS ARTICLE OF MERCHANDISE.

SCIRE FACIAS.

In an action of scire facias against the indorser of a bill in equity for costs ordered to be paid by the plaintiff in such suit, the defendant in scire facias is bound conclusively by the record in the suit in equity. *Bird* v. *Johnston*, 28.

Where, therefore, the bill that he indorsed describes the plaintiff in equity as a resident of another State, the defendant at the trial of the scire facias cannot be allowed to show that the plaintiff in the suit in equity was an inhabitant of this Commonwealth when the bill in equity was filed. *Ibid.*

In such an action of scire facias a finding of the jury in answer to a special question of the court, that the plaintiff in the suit in equity was an inhabitant of this Commonwealth at the time of the filing of the bill, must be disregarded as of no effect. *Ibid.*

Statement in the return of the officer on an execution for costs was held to be some evidence of "avoidance or inability" under R. L. c. 173, § 39, which makes the indorser of a bill in equity liable to pay all costs which may be awarded against the plaintiff "in case of avoidance or inability of the plaintiff," and to warrant a special finding of the jury that the plaintiff in equity was unable to pay the amount of the execution for costs. *Ibid.*

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SEAL.

In a suit in equity against the executor of a will to have a deed of the plaintiff to the defendant's testator set aside because it was procured by fraud and undue influence, was voluntary and without consideration and was incomplete in that it bore no seal, it is proper for the defendant to file a cross bill against the plaintiff alleging that the deed was supported by an adequate and valuable consideration, was valid, and that the omission of the seal was due to accident. *Parsons* v. *Parsons*, 544.

And upon findings of a master, warranted by the evidence, sustaining such allegations, a decree may be entered directing that the deed be completed by the affixing of a proper seal. *Ibid.*

SET-OFF.

Where a defendant in an action of contract files a declaration in set-off setting forth a claim which is a proper subject of set-off, he has a right to a determination of the question, whether he is entitled to recover the whole or any part of his claim. *Woodworth* v. *Fuller*, 160.

General verdict in such an action for the plaintiff in a sum found by an auditor who also had found that there was no right of recovery in set-off was held not to be a finding upon the declaration in set-off. *Ibid.*

Judge in such a case is not warranted in denying a new trial because he is convinced that the jury intended to follow the finding of the auditor. *Ibid.*

SHIP.

On the evidence at the trial of an action for personal injuries and death of a longshoreman, who, when assisting in unloading a ship, fell because a temporary platform which he had been accustomed to use was not in place because the superintendent had caused it to be removed, it was held that there was nothing to show negligence on the part of the superintendent, who had no reason to think that the longshoreman expected to use the platform to stand upon when it was apparent that it had been removed, and that it was not the duty of the superintendent to warn an experienced longshoreman of a danger which was plainly visible. *Kenneally* v. *Oceanic Steam Navigation Co. Ltd.* 446.

In the same case it was held that the platforms were not a part of the ways, works or machinery of the defendant. *Ibid.*

Action for personal injuries resulting from the falling upon the plaintiff of the stern of a ship when he was assisting a lighter company in raising it to clear the propeller. *Collins* v. *Splane*, 281.

SNOW AND ICE.

Where a person is injured by ice falling upon him due to a defective condition of a building and dies within six days without notice thereof having been given in accordance with Sts. 1908, c. 305; 1913, c. 324, in his behalf to the person responsible for the condition of the premises resulting in the injury, a notice given five days after the death of the person so injured by an attorney at law acting on behalf of one who more than a month later was ap-

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pointed administrator of the estate of the person so injured does not satisfy the requirements of the statute, even if the attorney's act is ratified by the administrator after his appointment. *O'Neil* v. *Squire*, 294.

Upon the evidence at the trial of an action against the owner of an apartment house by the occupant of an apartment therein for personal injuries sustained by falling on the outside steps of the house, controlled by the defendant and used in common by all the tenants, by reason of snow or ice negligently allowed to accumulate and remain thereon, where it appeared that the defendant had taken upon himself the duty of cleaning the platforms and steps from ice and snow, it was held that the plaintiff was entitled to go to the jury. *Erickson* v. *Buckley*, 467.

Under St. 1908, c. 305, as amended by St. 1913, c. 324, a husband, who has incurred expenses by reason of personal injuries sustained by his wife resulting from snow or ice, is required to give the statutory notice in order to maintain an action for his loss thus sustained. *Ibid.*

A notice given by a wife under St. 1908, c. 305, as amended by St. 1913, c. 324, of personal injuries sustained by her resulting from snow or ice, which is confined by its terms to her claim for damages and was "given at her request and in her behalf. By her attorneys, . . ." is not a notice in behalf of her husband as the foundation of a claim by him for consequential damages arising from her injuries. *Ibid.*

Evidence which was held to warrant a finding that a release of all demands, signed by a woman, was signed upon representations that it included only injury to her muff from falling ice, and not personal injuries. *Connors* v. *Richards*, 436.

SOAP.

Testimony of a driver of a team for a rendering plant, who in behalf of his employer collected soap grease, giving in payment therefor soap which it did not manufacture but acquired from others in the usual course of its business, that sometimes a nail was found in bars of the soap and that he examined them before delivering them to purchasers, is not evidence tending to show that the presence of a needle in a bar of soap given by the driver to a customer was due to negligence of the driver or of his employer. *Barrango* v. *Hinckley Rendering Co.* 93.

The mere fact, that a member of the family of the customer to whom the bar of soap was delivered by the driver, as above described, was injured by a needle embedded in the soap, is not evidence of negligence of the driver or of his employer. *Ibid.*

SPRINGFIELD.

St. 1913, c. 429, in substance empowering the mayor and aldermen and the city council of Springfield to delegate to commissions, boards or heads of departments such powers as to the granting and issuing of licenses or permits as the mayor and aldermen or the city council are authorized to grant and issue by the statutes of the Commonwealth, is constitutional. *Commonwealth* v. *Slocum*, 180.

It is a proper exercise of the power so granted for the city council of Springfield by an ordinance approved by the mayor to delegate to the police commission of that city the power vested in the city by St. 1916, c. 293,

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upon its acceptance of that statute by the council, of licensing and regulating the transportation of passengers for hire by motor vehicles. *Commonwealth* v. *Slocum*, 180.

The authority thus conferred by St. 1913, c. 429, above described, includes authority to delegate powers conferred upon the city council by statutes after its passage as well as those already conferred at the time of its enactment. *Ibid.*

By a provision of an ordinance of the city council of Springfield, which had accepted St. 1916, c. 293, authorizing the police commission of the city to grant licenses for the transportation of passengers for hire by motor vehicles when the commission finds the applicants to be "suitable to conduct such business" and the vehicles, after inspection, to be "proper and safe for use in such business," an untrammelled volition to grant or deny applications is not conferred, and the police commission is under obligation to act reasonably with reference to a business recognized as lawful when pursued with adequate safeguards. *Ibid.*

A further provision of the same ordinance, that each licensee shall furnish a bond in the sum of $1,000 for the benefit of persons who may be injured by the carelessness of the licensee or of his employee in operating the motor vehicle, is not unduly burdensome nor unreasonable. *Ibid.*

Other provisions of the same ordinance, giving to the treasurer of the city power after a hearing to require further surety or sureties upon the bond to be given by the licensee as above described, were held not to be open to sound objection. *Ibid.*

A requirement in the same ordinance of the payment of $5 for each such license is not as a matter of law a tax upon property rather than a fee. *Ibid.*

It was held that the ordinance above described was not prohibitive of a legitimate business but was merely regulative within the limits of reason, that it was not void as against public policy, and that it was constitutional and valid. *Ibid.*

STATUTE.

Construction.

Both R. L. c. 167, § 110, and St. 1909, c. 190, relating to the reduction or dissolution of an excessive or unreasonable attachment, are remedial in their nature and designed to afford relief against conduct in its nature resembling abuse of the process of attachment; and their words should be construed in accordance with their manifest purpose in order to afford adequate redress for the evil against which they appear to be aimed. *Shea* v. *Peters*, 197.

By the increase, effected by St. 1917, c. 340, § 1, upon its acceptance by the mayor and city council of Boston, in the salaries of the clerks of police, district and municipal courts, with certain exceptions, to three fourths of the salaries received by the justices of their respective courts from three fifths thereof, as previously provided by St. 1904, c. 453, § 1, the salaries of the assistant clerks, which by the same section of St. 1904, c. 453, had been made two thirds of the salaries of the clerks, were increased to two thirds of the increased salaries of the respective clerks. *Simmons* v. *County of Suffolk*, 236.

A statute must be interpreted according to the intent of the makers, to be ascertained from its several parts and all its words, construed by the or-

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dinary and approved usage of the language, unless the words used have acquired a peculiar meaning in the law, considered in connection with the cause of its enactment, the subject matter to which it applies, the pre-existing state of the common and statutory law, the mischief or imperfection to be remedied, and the main object to be accomplished, to the end that it be given an effect in harmony with common sense and sound reason. *Duggan* v. *Bay State Street Railway*, 370.

Repeal.

For the purpose of enforcing a mechanic's lien which came into existence before January 1, 1916, R. L. c. 197, § 10, was not repealed by St. 1915, c. 292, § 13. *Ainslee* v. *Boscketti*, 577.

STATUTE OF FRAUDS.

See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS.

See LIMITATIONS, STATUTE OF.

STATUTES CITED AND EXPOUNDED.

See page 755.

STOCKBROKER.

Suit under R. L. c. 99, §§ 4, 6, for money paid as margins to a stockbroker. *Houghton* v. *Keveney*, 49.

If a stockbroker, who had transactions with a customer carried on upon margins and made an agreement to carry certain stock upon margin for him as long as he wished and to deliver to him on demand the same number of shares upon payment of what he might then owe, sold the stock in question to himself, such sale was a breach of the duty owed by the stockbroker to the customer and was voidable by the customer. *Hall* v. *Paine*, 62.

In order to avoid such sales, it was necessary for the plaintiff to repudiate them after he discovered their voidable character. *Ibid.*

If the plaintiff did not repudiate such sales upon learning of their voidable character, he must be taken to have ratified them. *Ibid.*

Neither a certain letter written by the customer to the stockbroker before he learned of certain improper sales by the stockbroker to himself of securities of the customer, nor the bringing of an action against the stockbroker, in the course of the trial of which the customer for the first time learned of the sales, could be regarded as a repudiation of them. *Ibid.*

A stockbroker, who in good faith and without any knowledge or notice of an infirmity in the title of his customer, sells for such customer a bond of the United States of America payable to bearer, deducts a customary commission therefor and the amount of a stamp which necessarily was affixed and pays the balance of the sale price to his customer, is not liable in an action of tort for conversion to the owner of the bond, from whom it has

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been stolen and given to the stockbroker's customer to be sold. *Pratt* v. *Higginson*, 256.

The same rule applies to a sale by the stockbroker under the same circumstances of a bond of the American Telephone and Telegraph Company, payable to a bank as trustee or to bearer and convertible at maturity at the owner's option into capital stock of the company, such a bond under R. L. c. 73, § 22, cl. 4, being a negotiable instrument. *Ibid.*

STREET RAILWAY.

In an action for personal injuries and death caused by alleged negligence in running into the plaintiff's intestate with a street railway car after he had left a car on a parallel track going in the opposite direction, it was pointed out that the intestate had ceased to be a passenger of the defendant when he had alighted from the car. *Mercier* v. *Union Street Railway*, 397.

If a city makes an excavation between the rails of a street car track and the street railway corporation undertakes to guard the hole and to prevent travellers from falling into it, the assumption of that duty is not an act by the corporation *ultra vires*. *Charles* v. *Boston Elevated Railway*, 536.

Actions founded on alleged negligence of street railway corporations or their employees, see appropriate subtitle under NEGLIGENCE.

SUPERIOR COURT.

Where upon a petition to the Superior Court, alleging that the debts of a certain corporation carrying on an established manufacturing business were not being paid although its assets were sufficient for that purpose and containing no allegation of insolvency, that court appointed a receiver, and afterwards in bankruptcy proceedings a trustee of the corporation was appointed, who appealed from a decree of the Superior Court allowing the receiver's account, it was held, under the circumstances, that the Superior Court, which rightly appointed the receiver, had jurisdiction of all questions relating to his accounting and final discharge, including the fixing of the amounts of compensation for him and his attorneys. *Shannon* v. *Shepard Manuf. Co. Inc.* 224.

Where at the time of the filing of a petition in bankruptcy the property of the bankrupt was in the hands of a receiver appointed by the Superior Court, that court has jurisdiction to settle the accounts of its receiver relating to his charge of the property up to the time of the adjudication in bankruptcy some months after the filing of the petition. *Ibid.*

The Superior Court had authority to establish Divorce Rule 6, relating to objections to the granting of a decree absolute. *Feldman* v. *Feldman*, 330.

Upon the argument of an appeal from a decree made by a judge of the Superior Court in a claim under the workmen's compensation act, a motion that the appeal be dismissed because not presented seasonably to this court must be denied where it appeared that upon a like motion the Superior Court made an order allowing the motion unless the appeal should be entered in this court within thirty days, and the appeal was entered within that time. *Moran's Case*, 500.

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SURETY.

In the absence of fraud or collusion, a judgment entered against two defendants in the lawful exercise of the power of the court is conclusive against a surety upon a bond to dissolve an attachment given by one of the defendants. *Salvin* v. *Sidman*, 278.

Accordingly, it is not a valid defence on the part of such surety in an action against him upon such a bond, that the judgment was entered before the time had expired for the filing of an answer by his principal's co-defendant, who had been made a party defendant by an amendment after the giving of the bond. *Ibid.*

An amendment to the writ and declaration in an action against the maker of a promissory note, adding as a party defendant an indorser of the note, does not change the liability upon a bond to dissolve an attachment given by the first defendant before the allowance of the amendment. *Ibid.*

Therefore, the allowance of such an amendment without notice to the surety does not discharge such surety, and, after judgment against both defendants by default, the plaintiff may maintain an action upon the bond against such surety. *Ibid.*

TAX.

On Legacies and Successions.

Where, by reason of the failure of a donee of a power in a deed to exercise the power in her will, the property passed to a trustee, it was held that no legacy or succession tax was due from the trustee, because no one had become entitled to the possession or enjoyment of the property by reason of the donee's failure to exercise the power given to her, although thereby a new power of appointment had come into existence. *Attorney General* v. *Thorp*, 25.

Under St. 1909, c. 490, Part IV, § 1, as amended by St. 1916, c. 268, § 1, shares of a real estate trust, the general scheme of which works a conversion of all the property of the trust into personalty as one fund from the outset, are personal property and are not subject to the tax. *Priestley* v. *Treasurer & Receiver General*, 452.

Deed of trust creating a real estate trust which, under the same statute, was held to bring about no equitable conversion of the real property into personalty with the result that shares of such a trust that belonged to a testator who died domiciled in a foreign country were subject to a legacy and succession tax. *Ibid.*

On Income.

The effect of the provision of the income tax law contained in St. 1916, c. 269, § 14, in connection with the final sentence of St. 1909, c. 490, Part I, § 23, cl. 5, of the general tax law, is that the income from property held in trust in another State by a trustee, who there is taxed for it, is exempted from taxation to the recipient of the income resident in this Commonwealth. *Maguire* v. *Tax Commissioner*, 503.

Under St. 1916, c. 269, §§ 2, 11, and St. 1909, c. 490, Part I, § 23, cl. 5, income received by a resident of this Commonwealth from intangible property held for his benefit by a trustee resident in another State and not taxable in that State is subject to an income tax. *Ibid.*

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Tax (*continued*).

The imposition by St. 1916, c. 269, called the income tax law, of a tax upon income received by a resident of this Commonwealth from intangible property held for his benefit by a trustee resident in another State and not taxable in that State is valid and does not violate any guaranty of the Fourteenth Amendment to the Constitution of the United States. *Maguire* v. *Tax Commissioner*, 503.

It here was pointed out that, whether a tax on the income received in Massachusetts by the beneficiary of property held in trust in another State and not taxed there be regarded as a tax on the right of the beneficiary to receive the income or as a tax on the income when received, in either event it is a property tax. *Ibid.*

The interest received by a pawnbroker in the course of his business lawfully may be taxed at the rate of six per cent under St. 1916, c. 269, § 2 (a), imposing a tax at that rate on income from "money at interest" and is not taxable under § 5 (b) of the same chapter, imposing a tax at the rate of one and a half per cent on income "derived from professions, employments, trade or business" and providing that "Interest and dividends taxable under section two of this act shall not be taxed under this section." *Goldman* v. *Tax Commissioner*, 554.

Sale for Non-payment.

Where a city becomes the purchaser of land sold by its collector of taxes at a tax sale, it receives a title subject to the later and paramount lien that may arise from taxes assessed after those for the collection of which the sale was made. *Chadwick* v. *Cambridge*, 580.

Foreclosure of Right of Redemption.

Upon a petition in the Land Court under St. 1915, c. 237, § 4, by the holder of a tax title to land in a city for the foreclosure of the right of redemption therefrom, it is proper for the trial judge to rule that the petitioner's title was paramount to titles acquired by the city through deeds of its collector of taxes to it as the purchaser at previous sales for the collection of taxes assessed and due in previous years. *Chadwick* v. *Cambridge*, 580.

TIDE WATER.

A pier extending into tide water, which was an obstruction to navigation and was built without obtaining any license from the harbor and land commissioners as required by R. L. c. 96, § 17, and had become the property of the owner of the land from which it ran, was held under the circumstances to be a public nuisance, making the landowner liable under St. 1907, c. 375, for the death of a person in the exercise of due care caused by such obstruction to navigation. *Fuller* v. *Andrew*, 139.

In an action against the landowner for such death, it appeared that the portion of the structure which fell on the boat containing the plaintiff's intestate was supported by piles driven into the bed of the harbor below low water mark, where the soil belonged to the Commonwealth, and it was held that the whole of the pier must be treated as maintained by the de-

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fendant, upon whose land one end of it rested, it having been designed for use solely in connection with that land. *Fuller* v. *Andrew*, 139.

In the case above described it was said that, in addition to the fact of the maintenance of the public nuisance, there also was evidence in regard to the condition of weakness and want of repair into which the pier had been suffered to fall which tended to show lack of care. *Ibid.*

Evidence of the maintenance of a public nuisance in tide water in violation of the express terms of a penal statute and dangerous in fact to those members of the public lawfully navigating in the neighborhood is evidence of negligence under St. 1907, c. 375. *Ibid.*

TOWNS.

See MUNICIPAL CORPORATIONS.

TRESPASS.

Actions by trespassers for personal injuries, see appropriate subtitle under NEGLIGENCE.

TRUST.

Creation.

A bill in equity seeking to establish a trust in land alleged that the defendant made "a good and sufficient declaration of trust in favor of the plaintiff" but also contained an allegation that a year before the time of the alleged declaration the land by procurement of the plaintiff was conveyed to a person other than the defendant, and it was held that, assuming that the averment quoted should be interpreted to mean that the defendant made a declaration in writing, such a declaration could establish no trust in land that did not stand in the name of the defendant. *Keown* v. *Keown*, 313.

Validity.

Charitable trust which was attempted to be created by will but was wholly undefined and invalid. *Blunt* v. *Taylor*, 303.

A bill in equity by a husband against his wife, alleging that the plaintiff caused certain parcels of real estate which he had paid for to be conveyed to the defendant, who "expressly agreed and declared that she held the title to said real estate for the benefit of the plaintiff," sets forth no valid trust, the alleged declaration of defendant not being alleged to be in writing as required by R. L. c. 147, § 1. *Keown* v. *Keown*, 313.

Construction of Instrument creating Trust.

Application of the rule, that a legacy which is a part of a residue lapses on the death of the legatee before its vesting and cannot again fall into the residue, where the residue clause was placed in trust to pay one third of the income to the widow for life and certain sums to a nephew and a niece and the balance was to be divided between the nephew and the niece, and the widow waived the provisions for her and the nephew died leaving the widow surviving. *Crocker* v. *Crocker*, 478.

In the case above described it was pointed out that the will disclosed no

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reason for invoking the rule, which sometimes is called inaccurately the satisfaction of disappointed legatees, as illustrated by Shreve v. Shreve, 176 Mass. 456. *Crocker* v. *Crocker*, 478.

Constructive.

Where a bank has had no actual or constructive notice of fraud or misdoing on the part of a treasurer, who is one of its depositors, if the bank acting in good faith merely credits deposits of checks, which it knows to have been drawn by the treasurer upon the funds of the principal, to the personal account of the treasurer, this does not make it liable to the principal if the treasurer afterwards misappropriates the deposit. *Kendall* v. *Fidelity Trust Co.* 238.

In a suit in equity by the trustees of a land trust against a trust company, seeking to impress with a trust funds deposited with the defendant by the plaintiff's assistant treasurer, a dishonest agent, it was held under the circumstances that, as the defendant had no interest in the deposits and never had received any part of them for the payment of any debt to it, the defendant could not be charged with constructive notice of the fraudulent conduct of the depositor, and accordingly that there was no evidence that the defendant knew that the depositor intended to misappropriate the funds, and that the plaintiff was entitled to no relief against it. *Ibid.*

In such a suit, the dishonest employee has no interest in the subject matter of the suit and is not a necessary party. *Ibid.*

In a bill in equity by a mother against the executrix of the will of a son to whom during his life she had conveyed certain real estate, to have the conveyance set aside, it was held that the relationship of parent and child did not preclude business relations between them. *Parsons* v. *Parsons*, 544.

Statement of the rule for determining the validity of such transactions. *Ibid.*

Upon application of the rule, it was held that the conveyance was for a good consideration and was valid. *Ibid.*

Charitable.

Charitable trust which was attempted to be created by will but was wholly undefined and invalid. *Blunt* v. *Taylor*, 303.

Real Estate Trust.

Under St. 1909, c. 490, Part IV, § 1, as amended by St. 1916, c. 268, § 1, shares of a real estate trust, the general scheme of which works a conversion of all the property of the trust into personalty as one fund from the outset, are personal property and are not subject to the tax. *Priestley* v. *Treasurer & Receiver General*, 452.

Deed of trust creating a real estate trust which, under the same statute, was held to bring about no equitable conversion of the real property into personalty with the result that shares of such a trust that belonged to a testator who died domiciled in a foreign country were subject to a legacy and succession tax. *Ibid.*

The declaration of trust creating the real estate trust first above described, of which the shares were held to be personal property, contained a provi-

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sion that the "shares hereunder shall be personal property," and, in regard to the partnership real estate trust whose shares were held to be real estate, it was pointed out that the deed of trust creating that partnership contained no provision that the shares should be personal property, "whatever the legal effect of such a clause may be." *Priestley* v. *Treasurer & Receiver General*, 452.

If what is desired in order to carry out the purposes of a real estate trust is an organization with a distinct entity, intermediate between a corporation and a partnership or pure trust and with its own rights and obligations, the Legislature and not the courts must be resorted to. By DE COURCY, J. *Ibid.*

Under R. L. c. 48, § 17.

The provision contained in R. L. c. 48, § 17, for the appointment of a trustee to receive damages awarded for the taking of interests in real estate for the laying out or alteration of a highway is intended to apply merely to cases where the only parties in interest are the tenant for life or for years of the whole estate on the one hand and the remainderman or reversioner on the other. *Mills* v. *Samuels*, 1.

The owner of the reversion of real estate taken for the widening of a highway which has been leased under a lease in writing to a general lessee, who has made subleases in writing of different parts of the property to various sublessees, cannot maintain a petition under the provisions of R. L. c. 48, § 17, and the damages awarded must be apportioned under the provisions of §§ 20–24 of the same chapter. *Ibid.*

Taxation.

Income tax upon income from property held in trust in another State. *Maguire* v. *Tax Commissioner*, 503.

TRUSTEE PROCESS.

Removal from the Superior Court to the District Court of the United States of a suit begun by trustee process. *Dunbar* v. *Rosenbloom*, 176.

Property impounded by order of a police court for the purposes of the prosecution of a complaint "until further order of said court" cannot be reached by trustee process until the impounding has been brought to an end by a further order of the court. *Wallace* v. *Coyne*, 475.

In order to reach such impounded property by an attachment on trustee process it is not enough to show that the proceedings in which the property was impounded have been disposed of and that the time has come to bring the impounding order to an end. *Ibid.*

It is necessary to show that the further order of the police court has been made which alone can terminate the impounding. *Ibid.*

The fact, that the district attorney who had charge of the prosecution in which the property was impounded was willing that the impounding should be ended, does not show that it has been ended. *Ibid.*

Whether property impounded by such an order of court is held by its custodian as a public officer who is accountable for it merely as such officer within R. L. c. 189, § 31, cl. 3, it here was not necessary to consider. *Ibid.*

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USAGE.

See CUSTOM.

WAGERING CONTRACTS.

In a suit under R. L. c. 99, §§ 4, 6, to recover money paid as margins on wagering contracts, if the plaintiff did not own the securities at the time of giving the orders to sell and settlements were made without the completion of the purchase or sale of the securities ordered to be bought or sold, this is *prima facie* evidence that there was an intention that there should be no actual purchase or sale and that there was reasonable cause to believe that such intention existed within the meaning of § 4 of the statute. *Houghton* v. *Keveney*, 49.

In such suit in equity where four series of transactions were alleged and the defendant set up the statute of limitations, if the first two series had been balanced and the plaintiff had given to the defendants a receipt in full covering them more than six years before the filing of the bill, the different series of transactions were distinct from each other and not an open running account, and the statute of limitations was a bar to the action upon the first two series of transactions. *Ibid.*

WAIVER.

Where the owner of certain land executed and delivered to a petitioner for the establishment of a mechanic's lien upon the land a bond to dissolve the lien with sureties properly approved, and the petitioner thereupon told one who proposed to purchase the land that the lien was discharged and waived by the giving of the bond but the bond was not recorded within ten days as required by R. L. c. 197, § 28, as amended by Sts. 1906, c. 223; 1909, c. 237, and the land was purchased, it was held that under the circumstances the petitioner had not thereby waived his lien, nor was he estopped, by reason of his representation based on a false idea as to the law, from pursuing his petition to judgment and sale. *Goldstein* v. *Tucker*, 259.

Whether a certain letter of an architect, accepting a building subject to certain defects which the builder was to remedy and which were remedied, under all the circumstances operated as a waiver of the right of the owner to insist upon the architect's final certificate, and, if it did so operate, whether the owner thereby was precluded from claiming in recoupment damages for defective workmanship or materials, were not raised by the record. *Hennebique Construction Co.* v. *Boston Cold Storage & Terminal Co.* 456.

WANTON AND RECKLESS MISCONDUCT.

See WILFUL AND WANTON MISCONDUCT.

WARRANTY.

See SALE.

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WATER SUPPLY.

Under R. L. c. 75, § 113, as amended by St. 1907, c. 467, § 1, a rule of the State board of health, that "No person shall . . ., unless permitted by a written permit of the board of water commissioners of the city of Haverhill, fish in . . . Crystal Lake . . ., so called, in the city of Haverhill . . ., said lakes . . . being used by said city as sources of water supply," is valid and enforceable. *Commonwealth* v. *Hyde*, 6.

WAY.

Private.

The owner of the fee in a passageway on which his building abuts may maintain a suit in equity against the owner of a building on the opposite side of the passageway for a mandatory injunction ordering the defendant to remove from his building fire escapes overhanging the plaintiff's land, without joining as parties other persons who have rights of way in the passageway but have no interest in the fee. *Zimmerman* v. *Finkelstein*, 17.

The presumption that, where the owner of a tract of land conveys to another a part of it from which no right of way to a public way exists unless there be one over land of the grantor, such a way over the grantor's land is intended to be and is included in the grant, may be rebutted by evidence tending to show that the grantor's intention, understood by the grantee, was that there should be no such way over his remaining land but that the grantee should use a way over land then owned and occupied by the grantee's wife. *Orpin* v. *Morrison*, 529.

It was held that certain evidence admitted unqualifiedly and without any objection or exception at the hearing of a petition for the registration of the title to certain land where the existence of a way by necessity is an issue, as to the expressed intention of a former owner of the locus, in conveying it to another, that the grantee would use, to reach a public way otherwise inaccessible excepting over the remaining land of the grantor, a way across land then owned by the grantee's wife, must be given proper probative force and that its admissibility could not be considered by this court. *Ibid.*

Where, at the close of all the evidence at the hearing of the petition above described, the judge ruled that the evidence described was competent and an exception was taken, such ruling and exception do not bring to this court the question of the admissibility or competency of the evidence. *Ibid.*

Public.

If a city makes an excavation between the rails of a street car track and the street railway corporation undertakes to guard the hole and to prevent travellers from falling into it, the assumption of that duty is not an act by the corporation *ultra vires*. *Charles* v. *Boston Elevated Railway*, 536.

If, owing to negligence of the street railway company in performing the duty thus assumed by it, the death of a person is caused, recovery for such causing of death is not limited to the $1,000 allowed by R. L. c. 51, § 17, in an action against a municipality for loss of life caused by a defect in a highway. *Ibid.*

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WHARF.

A pier extending into tide water, which was an obstruction to navigation and was built without obtaining any license from the harbor and land commissioners as required by R. L. c. 96, § 17, and had become the property of the owner of the land from which it ran was held under the circumstances to be a public nuisance, making the landowner liable under St. 1907, c. 375, for the death of a person in the exercise of due care caused by such obstruction to navigation. *Fuller* v. *Andrew*, 139.

In an action against the landowner for such death, it appeared that the portion of the structure which fell on the boat containing the plaintiff's intestate was supported by piles driven into the bed of the harbor below low water mark, where the soil belonged to the Commonwealth, and it was held that the whole of the pier must be treated as maintained by the defendant, upon whose land one end of it rested, it having been designed for use solely in connection with that land. *Ibid.*

In the case above described it was said that, in addition to the fact of the maintenance of the public nuisance, there also was evidence in regard to the condition of weakness and want of repair into which the pier had been suffered to fall which tended to show lack of care. *Ibid.*

WILFUL AND WANTON MISCONDUCT.

No degree of negligence can make one liable for an injury to a trespasser. To establish such liability it must be shown that the person who injured the trespasser was a wilful or wanton wrongdoer in causing the injury. *Wentzell* v. *Boston Elevated Railway*, 275.

An alleged wrongdoer acts wilfully or wantonly only when he inflicts an injury intentionally or is so utterly indifferent to the rights of others that he acts as if such rights did not exist. By BRALEY, J. *Ibid.*

Before the passage of St. 1915, c. 87, any person travelling on a highway in an unregistered motor vehicle was a trespasser upon the highway and, if he was injured by a collision of the motor vehicle with a street railway car, he could hold the street railway corporation liable for his injuries only by showing that the collision was caused by the wilful or wanton misconduct of its motorman or of some other of its agents. *Ibid.*

Conduct of a motorman operating a street railway car in a city street and running into a motor car, which, although it was evidence of negligence was not evidence of wanton or reckless misconduct on the part of the motorman which would make the street railway corporation liable to a trespasser on the highway in the motor car injured by the collision. *Ibid.*

WILL.

Attestation.

It does not make valid the attestation of a will, that all three witnesses subscribed their names in the presence of the testator, if when two of the witnesses signed their names the instrument was folded so as to conceal the signature of the testator and neither of them saw him sign or could have seen his signature in his presence. *Hawkes* v. *Hawkes*, 11.

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Compromise of Controversy concerning Will.

A compromise agreement under R. L. c. 148, §§ 15–18, settling a controversy concerning a will, which is signed by all parties in interest, including a guardian *ad litem* representing all future contingent interests of persons unascertained and not in being who might become interested, it was held, might be found by the Probate Court under St. 1913, c. 222, to be just and reasonable in its effect upon any future contingent interests that might arise under such will within the meaning of R. L. c. 148, § 17, although it cut off all possible benefit which could come to the heirs at law of a son of the testator under the terms of the will. *Copeland* v. *Wheelwright*, 131.

Withholding of Will.

It here was assumed for the purposes of decision, that an administrator *de bonis non* with the will annexed was the proper party to sue for damages suffered by the negligent withholding of the will. *Sawyer* v. *Old Lowell National Bank*, 342.

Where one, who has hired a safe deposit box from a national bank and who also has a deposit account in the bank, leaves with the officials of the bank a tin box, without disclosing its contents, which is placed in a bank vault where books and records are stored, the bank does not become the bailee of a will of the depositor contained in the tin box. *Ibid.*

Whether the remedy for the failure of a person having custody of a will to deliver such will into the Probate Court, which is given by R. L. c. 135, § 14, "to a person who is aggrieved for the damage sustained by him by reason of such neglect," is an exclusive remedy, here was referred to as a question that was not passed upon. *Ibid.*

Whether under the national bank act and before the passage of the federal reserve bank act, U. S. St. 1913, c. 6, § 11 k, a national bank had authority to accept a will for safe keeping and would be legally liable for a failure to deliver according to directions a will thus accepted in custody, here was referred to as a question which it was unnecessary to consider. *Ibid.*

Construction.

See Devise and Legacy.

WITNESS.

Cross-examination.

Exclusion, at the trial of an action against a street railway company for personal injuries and death caused by running into the plaintiff's intestate, of a question asked by the plaintiff in cross-examination of one of the passengers on the car that struck the intestate, "Don't you know that the usual speed there is forty miles an hour?" was held to have been within the discretion of the presiding judge, which appeared to have been exercised wisely. *Mercier* v. *Union Street Railway*, 397.

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Subscribing Witness to Will.

It does not make valid the attestation of a will, that all three witnesses subscribed their names in the presence of the testator, if when two of the witnesses signed their names the instrument was folded so as to conceal the signature of the testator and neither of them saw him sign or could have seen his signature in his presence. *Hawkes* v. *Hawkes*, 11.

Expert.

See appropriate subtitle under EVIDENCE.

Absence of Witness as Evidence.

Evidence at the trial of an action against the owner of a motor vehicle for personal injuries caused by negligence of the chauffeur driving the car in the defendant's absence was held not to warrant a finding that a failure of the plaintiff to find the chauffeur to summon him in order that he might testify as a witness relating to the scope of his employment was due to any act on the part of the defendant. *Gardner* v. *Farnum*, 193.

WORDS.

"Convertible." See *Pratt* v. *Higginson*, 256, 259.
"Dependents." See *Bott's Case*, 152, 154.
"Final decision." See *Real Property Co. Inc.* v. *Pitt*, 526, 527, 528, 529; *Hall Publishing Co.* v. *MacLaughlin*, 534, 536.
"Kill." See *Commonwealth* v. *Wakelin*, 567, 572, 573.
"Murder." See *Commonwealth* v. *Wakelin*, 567, 573.
"Provincial." See *Leonard* v. *Carleton & Hovey Co.* 262, 265.
"Suitable location." See *Wellington* v. *Crowley*, 107, 109, 110.

WORKMEN'S COMPENSATION ACT.

Procedure.

Evidence.

It was pointed out, that in cases arising under the workmen's compensation act, although questions of evidence apparent on the record will be considered in accordance with general equity practice, errors in the admission or exclusion of evidence will not be made the ground for the reversal of a decree unless this is necessary to protect the substantial rights of the parties. *Beckles's Case*, 272.

The substantial rights of a claimant were not affected by the exclusion by the Industrial Accident Board of evidence of the condition of an elevator, which caused the injury and death of the employee, about six months after the accident, the board having found that it was in a defective condition at the time of the accident and for a long time before. *Ibid.*

It also was held for the same reason that the claimant was not harmed because certain evidence relating to the condition of the elevator after the accident, which was admitted *de bene* by the arbitration committee, afterwards was excluded by the committee. *Ibid.*

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In a claim by a dependent widow under the workmen's compensation act, the arbitration committee found that "the arbitrators are unable to determine what was the cause of [his] death, this being wholly a matter of conjecture, and, therefore, are unable to find that [his] death . . . arose out of his employment," and, this finding being adopted by the Industrial Accident Board, it was held that it was warranted by the evidence. *Murphy's Case*, 99.

Appeal.

It was pointed out, that in cases arising under the workmen's compensation act, although questions of evidence apparent on the record will be considered in accordance with general equity practice, errors in the admission or exclusion of evidence will not be made the ground for the reversal of a decree unless this is necessary to protect the substantial rights of the parties. *Beckles's Case*, 272.

In a claim under the workmen's compensation act a finding of fact, made by the Industrial Accident Board on evidence warranting such a finding in the exercise of their right to disbelieve any part of the evidence which in their opinion was not entitled to credit, is not open to review by this court on an appeal from a decree affirming the decision of the board. *Fitzgibbons's Case*, 473.

The substantial rights of a claimant were not affected by the exclusion by the Industrial Accident Board of evidence of the condition of an elevator, which caused the injury and death of the employee, about six months after the accident, the board having found that it was in a defective condition at the time of the accident and for a long time before. *Beckles's Case*, 272.

For the same reason the claimant was not harmed because certain evidence relating to the condition of the elevator after the accident, which was admitted *de bene* by the arbitration committee, afterwards was excluded by the committee. *Ibid.*

Claim under the workmen's compensation act by a husband as the dependent of an employee who, on return from luncheon to her place of employment, went up a flight of five granite steps carrying in each hand a packed travelling bag and when on the top step fell forward into her employer's store and died, was recommitted to the Industrial Accident Board, who had awarded compensation, to find the cause of the employee's fall or to find that the cause was unknown, the cause of the employee's fall being unexplained and it not appearing that the board had passed on that question. *Hallett's Case*, 326.

In a claim under the workmen's compensation act by an employee of a town, who suffered a sunstroke when he was working for the town in a gravel or sand pit, the Industrial Accident Board decided that the injury of the employee arose out of, as well as in the course of, his employment and awarded compensation, but, on an appeal from a decree of the Superior Court affirming such decision, it was held that under the circumstances the decree must be reversed and the case recommitted to the Industrial Accident Board to hear the parties on the question whether the employee was at liberty to stop his work in time to protect himself from injury. *McCarthy's Case*, 429.

Upon the argument of an appeal from a decree made by a judge of the Superior Court in a claim under the workmen's compensation act a motion that the

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appeal be dismissed because not presented seasonably to this court must be denied where it appeared that, upon a like motion the Superior Court had made an order allowing the motion unless the appeal should be entered in this court within thirty days, and the appeal was entered within that time. *Moran's Case*, 500.

Under St. 1915, c. 132, a single justice of the Supreme Judicial Court has discretionary power to suspend a decree of the Superior Court ordering an insurer to make payments to the dependent widow of a deceased employee, from which the insurer has claimed an appeal. *Dempsey's Case*, 583.

The granting of such an order of suspension is a proper exercise of discretion if there is reasonable ground for raising the question of the insurer's right to appeal, although it afterwards is ordered by this court that the insurer's appeal be dismissed as claimed without right. *Ibid.*

Under St. 1911, c. 751, Part III, § 11, as amended by St. 1912, c. 571, § 14, and St. 1917, c. 297, § 7, there is no right of appeal from a decree of the Superior Court "based upon . . . a memorandum of agreement" approved by the Industrial Accident Board. *Ibid.*

The denial by the statute mentioned above of the right of appeal from a decree of the Superior Court based upon such a memorandum of agreement applies to an appeal attempted to be taken on the ground that the court was without jurisdiction of the proceeding because the injury for which compensation was awarded occurred on navigable waters and, under the Constitution of the United States, was cognizable only under admiralty jurisdiction. *Ibid.*

An award by the Industrial Accident Board to partly dependent parents of a deceased employee jointly was held to have been wrong for lack of evidence of the relative extent of the dependency, and the case was remanded to the board for the determination of that fact. *Pagnoni's Case*, 9.

Suspension of decree pending appeal.

Under St. 1915, c. 132, a single justice of the Supreme Judicial Court has discretionary power to suspend a decree of the Superior Court ordering an insurer to make payments to the dependent widow of a deceased employee, from which the insurer has claimed an appeal. *Dempsey's Case*, 583.

The granting of such an order of suspension is a proper exercise of discretion if there is reasonable ground for raising the question of the insurer's right to appeal, although it afterwards is ordered by this court that the insurer's appeal be dismissed as claimed without right. *Ibid.*

To whom Act applies.

The provisions of the workmen's compensation act do not apply to a corporation organized for carrying on a public charity. *Zoulalian* v. *New England Sanatorium & Benevolent Association*, 102.

Whether the provisions of St. 1911, c. 751, Part I, § 1, deprive a railroad corporation which is not a subscriber under the workmen's compensation act of the defences of contributory negligence and assumption of risk in an action brought against it under St. 1906, c. 463, Part I, § 63, as amended by St. 1907, c. 392, and St. 1912, c. 354, for causing the death of one of its employees, here was mentioned as a question which it was not necessary to decide in the present case. *Hix* v. *New York Central & Hudson River Railroad*, 309.

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In a claim for compensation under the workmen's compensation act by one who was the president and a director and the owner of one half of the capital stock of a corporation which was the employer, it was held that under the circumstances and upon the representations leading up to and the provisions of the policy insuring the corporation, a decree of the Superior Court, confirming an award by the Industrial Accident Board for the claimant, based on a ruling that "the fact that the insurer, for any reason, did not include the earnings of the claimant in its payroll audit, has no bearing upon the rights of the claimant as an employee," must be reversed and a decree entered in favor of the insurer, because, assuming that the claimant was an employee of the corporation of which he was the president, his injury was not covered by the policy because his remuneration was not included in the payroll on which the premium was based. *Cashman's Case*, 600.

Injuries to which Act applies.

In a claim by a dependent widow under the workmen's compensation act, the arbitration committee found that "the arbitrators are unable to determine what was the cause of [his] death, this being wholly a matter of conjecture, and, therefore, are unable to find that [his] death . . . arose out of his employment," and, this finding being adopted by the Industrial Accident Board, it was held that it was warranted by the evidence. *Murphy's Case*, 99.

Claim under the workmen's compensation act by a husband as the dependent of an employee who, on return from luncheon to her place of employment, went up a flight of five granite steps carrying in each hand a packed travelling bag and when on the top step fell forward into her employer's store and died, was recommitted to the Industrial Accident Board, who had awarded compensation, to find the cause of the employee's fall or to find that the cause was unknown, the cause of the employee's fall being unexplained and it not appearing that the board had passed on that question. *Hallett's Case*, 326.

In the case above described it was said that, if the employee's injury was caused by her physical or mental condition not arising out of her employment or was brought about by her exertions in her own affairs or by any other cause than her employment, the dependent husband could not be awarded compensation. *Ibid.*

In a claim under the workmen's compensation act by an employee of a town, who suffered a sunstroke when he was working for the town in a gravel or sand pit, the Industrial Accident Board decided that the injury of the employee arose out of, as well as in the course of, his employment and awarded compensation, but, on an appeal from a decree of the Superior Court affirming such decision, it was held that under the circumstances the decree must be reversed and the case recommitted to the Industrial Accident Board to hear the parties on the question whether the employee was at liberty to stop his work in time to protect himself from injury. *McCarthy's Case*, 429.

In a claim under the workmen's compensation act, where the Industrial Accident Board has found, on evidence warranting such a finding, that the employee, who already had heart disease and colitis, sustained an injury

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arising out of and in the course of his employment that aggravated and accelerated the diseases from which he was suffering so that he died six days after the injury, an award of compensation to his dependent widow is justified. *Fitzgibbons's Case*, 473.

Dependency.

In a claim under the workmen's compensation act by the father and mother of a deceased employee, who lived in a foreign country and were alleged to be partly dependent next of kin, in the absence of any finding as to the relative extent of the dependency of the two parents, it was held to have been wrong for the Industrial Accident Board to make an award of compensation to them jointly. *Pagnoni's Case*, 9.

Where the board made such a joint award, it was ordered that the claim should be remanded to the board for determination of the relative extent of the dependency of the two parents under St. 1911, c. 751, Part II, § 7. *Ibid.*

A woman to whom an award is made under the workmen's compensation act as the dependent widow of a deceased employee is entitled to receive the payments during the whole of the period covered by the award if she lives so long, and her right to compensation does not cease by reason of her marriage before the expiration of the period to another man able and willing to support her. *Bott's Case*, 152.

In this case it was pointed out that in a claim under the workmen's compensation act by the alleged dependent widow of an employee, if the widow was living with her husband at the time of his death, the presumption created by St. 1911, c. 751, Part II, § 7 (*a*), that she was wholly dependent upon her husband's earnings for support, is made conclusive and cannot be affected by any proof of facts to the contrary. *Ibid.*

Amount of Compensation.

On appeal from a decree of the Superior Court affirming a decision of the Industrial Accident Board awarding a lump sum to an employee, who was eighteen years of age when injured, and giving him the benefit of St. 1915, c. 236, it was held that the findings of the board, resting upon evidence whose weight and credibility were wholly for their consideration, could not be disturbed. *Moran's Case*, 500.

Serious and Wilful Misconduct of Employer.

In a claim under the workmen's compensation act it was found by the Industrial Accident Board that a hydraulic elevator, in operating which the employee was killed, was at the time of the accident in a defective condition and had been so for a long time before, and that the employer, although grossly negligent "in continuing to maintain and operate an elevator which experience should have told the employer could not be put into a perfectly safe condition by the ordinary repairs attempted and made," was not guilty of "serious and wilful misconduct" within the meaning of St. 1911, c. 751, Part II, § 3, as amended by St. 1912, c. 571, § 1, so as to require the amount of compensation to be doubled, and it was held that this finding was not unwarranted as matter of law. *Beckles's Case*, 272.

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WRIT OF ERROR.

A voluntary appearance and a plea *in nullo est erratum* by the defendant in a writ of error, without any objection to the jurisdiction, nearly a year after the entry of the petition for the writ, confers jurisdiction of the subject matter and of the person of the defendant upon this court, although, after the writ was served upon the court to which it was directed and the record of the judgment sought to be reversed had been returned, no writ of scire facias to the defendant was issued. *Joyce* v. *Thompson*, 254.

A judgment in an action of contract is not subject to reversal upon a writ of error merely because the officer's return upon the writ states that, after making a nominal attachment, he left the summons "at his [the defendant's] last and usual place of abode," without adding the words "known to me to be such," the only reasonable interpretation of such a return being that the officer knew the facts to be as averred in his return, which showed a compliance with the requirements of R. L. c. 167, § 31. *Ibid.*

WRONGDOER WITHOUT REMEDY.

No degree of negligence can make one liable for an injury to a trespasser. To establish such liability it must be shown that the person who injured the trespasser was a wilful or wanton wrongdoer in causing the injury. *Wentzell* v. *Boston Elevated Railway*, 275.

Before the passage of St. 1915, c. 87, any person travelling on a highway in an unregistered motor vehicle was a trespasser upon the highway and, if he was injured by a collision of the motor vehicle with a street railway car, he could hold the street railway corporation liable for his injuries only by showing that the collision was caused by the wilful or wanton misconduct of its motorman or of some other of its agents. *Ibid.*

Conduct of a motorman operating a street railway car in a city street and running into a motor car, which, although it was evidence of negligence, was not evidence of wanton or reckless misconduct on the part of the motorman which would make the street railway corporation liable to a trespasser on the highway in the motor car injured by the collision. *Ibid.*

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